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INTERSTATE SHIPMENTS OF INTOXICATING
LIQUORS INTO "DRY" TERRITORY

HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SIXTY-SECOND CONGRESS
SECOND SESSION

ON

BILLS RELATING TO INTERSTATE SHIPMENTS OF INTOXI-
CATING LIQUORS INTO "DRY" TERRITORY

BEING

- S. 1523, INTRODUCED BY SENATOR CURTIS
- S. 2310, INTRODUCED BY SENATOR McCUMBER
- S. 3710, INTRODUCED BY SENATOR CULBERSON
- S. 4043, INTRODUCED BY SENATOR KENYON

Printed for the use of the Committee on the Judiciary

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Senators NELSON, DILLINGHAM, BORAH, BACON, and RAYNER.

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2

INTERSTATE SHIPMENTS OF INTOXICATING LIQUORS INTO "DRY" TERRITORY.

TUESDAY, JANUARY 30, 1912.

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,
Washington, D. C.

The subcommittee met at 10.30 o'clock a. m.

Present: Senators Nelson (chairman), Borah, Bacon, and Rayner.

Senator NELSON. A quorum is present, and the committee will come to order. This meeting is called for the purpose of giving a hearing on these several bills: Senate bill 1523, introduced by Senator Curtis; Senate bill 3710, introduced by Senator Culberson; Senate bill 2310, introduced by Senator McCumber, and Senate bill 4033, introduced by Senator Kenyon.

Senator CURTIS. Mr. Chairman, I understood that the Kenyon bill was to be considered in lieu of the Curtis bill, and that the Curtis bill would be set aside and the Kenyon bill would be substituted. The McCumber bill is substantially the same as the Kenyon bill except the Kenyon bill has one additional section covering one additional point. So I thought they might be considered together if Mr. Dinwiddie desires it. Section 2 of the Kenyon bill does not appear in the McCumber bill.

Mr. DINWIDDIE. That, with the addition of the word "received" in section 1, and the change in the title, are the only differences between those two bills.

Senator NELSON. Senator Curtis, do you desire to make a statement?

Senator CURTIS. No; I understand that Mr. Dinwiddie desires to argue the Kenyon bill. Senator Kenyon has not come yet.

Mr. DINWIDDIE. Here comes Senator Kenyon now.

Senator NELSON (addressing Senator Kenyon). Do you desire to make a statement, Senator Kenyon?

Senator KENYON. I think not, Mr. Chairman. Mr. Dinwiddie was to have charge of the matter this morning, but I may want to make a statement or an argument later.

STATEMENT OF REV. EDWIN C. DINWIDDIE.

Mr. DINWIDDIE. May it please the committee, all I care to do, unless the committee desires otherwise, is simply to set forth the reasons for this bill, and the conditions that obtain.

Senator NELSON. To which bill do you refer?

Mr. DINWIDDIE. I am referring especially to the Kenyon bill, which, as Senator Curtis has said, by joint action, the temperance forces of the country who have been pleading for legislation of this character are practically united upon as the desirable bill at this time.

The bill is as follows:

[S. 4043, Sixty-second Congress, second session.]

A BILL To prohibit interstate commerce in intoxicating liquors in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, including beer, ale, or wine, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited; and any and all contracts pertaining to such transactions are hereby declared to be null and void, and no suit or action shall be maintained in any court of the United States upon any such contract or contracts, or for the enforcement or protection of any alleged right based upon or growing out of such contract or contracts, or for the protection in any manner whatsoever of such prohibited transactions.

SEC. 2. That there shall be no property right in or to any such liquor while in the possession of any railway company, express company, or other common carrier in connection with any shipment or transportation thereof in violation of this act.

Mr. DINWIDDIE (continuing). To set forth the differences between this bill and the previous legislation we have asked for will be my purpose.

You may remember four years ago two members of the subcommittee who are present heard, as Senator Rayner expressed it at that time, *ad nauseum*, the arguments pro and con with respect to the proposed interstate commerce legislation, and I think in a very few words I can bring the matter down to date so that it will be fresh in our minds, and if Senator Borah has not gone over this matter thoroughly, this will give the facts so far as the law is concerned, I think.

Prior to the *Leisey v. Hardin* decision the law was that the silence of Congress with respect to the interstate traffic in intoxicating liquors gave the States freedom to regulate the traffic as they saw fit. That decision was distinctly reversed in *Leisey v. Hardin*, and there is where all of our difficulty originated, when the Supreme Court in that way took intoxicating liquors out of police and put them in commerce; and ever since that time the States of the country have been trying to get that power which they formerly exercised and which they still desire to exercise free and untrammelled from all interferences from the outside.

The Wilson law came as a direct result of the protests of our people throughout the country after the *Leisey v. Hardin* decision, which was to the effect, as you know, that a man living in one State had a constitutional right to order liquors from a wholesaler or a manufacturer of intoxicating liquors in another State, and have those liquors shipped to him through the channels of interstate commerce and delivered to him, and also he had the right to sell them in the original unbroken package, any law of the State of his residence to the contrary notwithstanding.

The Wilson law was passed, as I say, as the result of a very insistent and vehement demand on the part of the people for redress from the intolerable conditions which were brought about by reason of the decision in the *Leisey v. Hardin* case.

The Wilson Act was passed in 1890, and the net result of it, owing to a later decision of the Supreme Court in the *Rhodes* case (170 U. S.), was to deny to the importing consignee the right to sell the liquors in the original unbroken package. The court in the *Rhodes* case held that the term "upon their arrival in the State," which Congress had used in the Wilson law, meant after their delivery to the consignee, so that the consignee had the right to receive the liquors at the point of destination, but he could not sell them in the original package if the law of the State forbade it, as theretofore. That was the net result of the passage of the Wilson Act.

Anybody who has had any experience in the enforcement of anti-liquor legislation knows that the most effective weapon we have in this country with which to prevent the violation of State and local laws is what is known as the search-and-seizure process. It is an extraordinary procedure, but it has been justified and upheld by the courts from one end of the country to the other as being absolutely necessary to prevent fraud on the State and local laws in the various Commonwealths.

The difficulty we face now is that when the States attempt to enforce their legislation against the sale of intoxicating liquors contrary to their State laws, they get up against the commerce clause of the Constitution and in many States have been enjoined by the Federal courts from enforcing their legislation.

Now, I will give a concrete case. Doubtless there are thousands of others.

In my judgment the State of Oklahoma has not only the best constitutional provision—there are only three other States that have constitutional provisions prohibiting the traffic in intoxicating liquors—but in my judgment Oklahoma probably has the best code of enforcing legislation of any State. She ought to have. Her constitution and code are the last adopted, and she had the benefit of the experience of all the other States.

The State of Oklahoma, in my judgment, has done everything that a State can do to enforce her legislation. But the two Federal judges in that State have both interfered by injunction to prevent the State officers of the State of Oklahoma from carrying out the processes of their State courts with reference to this subject whenever interstate shipments of intoxicating liquors were involved.

The proposition of the State is—and I want to speak now not only with reference to Oklahoma but other States; it can be the proposition of any other State—the proposition of the State is that under a proper search-and-seizure law it can then determine whether or not intoxicating liquors are shipped into the State for valid purposes or for unlawful purposes.

If they are shipped in for lawful purposes, there is no law to be violated and the State has no right to libel the liquors and has no desire to do it. The liquors, if seized before then, are turned back to the consignee or the railroad carrier or whomsoever they have been wrested from; but if they are there for an unlawful purpose, the State ought to have the right, under proper process, by pro-

ceedings in rem, against the liquors, to determine judicially the fact as to whether the liquors are there for a lawful or for an unlawful purpose; and if they are there for the purpose of violating the law, the laws of the State ought to have the right to attach and the liquors be libeled and destroyed, if that is according to the law of the State, in order that there may be no violation of the laws of the Commonwealth.

Now, then, it was just that situation that has given rise to this insistent demand all over the country for legislation that will give the State power to act on these liquors before they get into the hands of the consignee who intends to violate the law.

Now, I think with that much of an explanation, I can come directly to the difference between the bills that are before the committee. I may say that the bill to which the chairman has referred, introduced by Senator Nixon, is a bill that this subcommittee may desire to take jurisdiction of, but nevertheless it is a bill referring to intoxicating liquors in connection with the Indians, and such bills have been heretofore before the Committee on Indian Affairs. It is one of the bills to which you referred, Mr. Chairman. It really does not have to do with interstate commerce.

The proponents of remedial legislation of this kind have been met for years past with the suggestion that the legislation which we have sought for could not be constitutionally enacted by the Congress of the United States. I do not confess that this morning, for I can not say that I believe this to be true. I do not admit that the legislation which we have been asking for is unconstitutional. I refer to the Littlefield bill, the Hepburn-Dolliver bill, the Carmack bill, the Tillman bill, the Bacon bill, the Hansbrough bill, and a number of other bills which have been before the Senate and Congress year after year, the purpose of all of which has been to subject intoxicating liquors to the jurisdiction of the State into which they were imported before delivery to the consignee as well as after. That was practically the gist of all of those various bills. They differed somewhat in detail. Some of the bills attempted to submit these imported liquors to the jurisdiction of the State at the State line, and others to the jurisdiction of the State at the point of destination, but all before delivery to the consignee. Now, we have been met for a great many years past with the suggestion—the validity of which I do not admit, but nevertheless we try to be practical men when we are up against a proposition of this kind—we have been met with the proposition that Congress can not enact such legislation without delegating to the States power which by the Constitution is confided to Congress, or without giving to the legislation of the States into which the liquors are imported an extraterritorial effect.

Without admitting that is so, we nevertheless have not yet been able to impress upon the committees of Congress the fact that we were right, and that Congress has under its plenary power to regulate interstate commerce the right to determine the time when the interstate character of an interstate shipment shall cease, and per consequence the article, whatever it may be—and of course particularly referring to intoxicating liquors—the article shall then be subject to the police powers of the State.

Now, that is the situation which we have faced. I am very glad to say that the bill we are especially referring to, introduced in the Senate by Senator McCumber last spring and modified and introduced recently by Senator Kenyon, is a bill that proposes, if possible, to give the States the remedy that they need and at the same time avoids the constitutional difficulties, whether they are real or imaginary, that we have met in the past. Personally, I believe that this bill does those two things.

Now, what is the power to regulate interstate commerce? In view of the probable shortness of the time this morning I can eliminate probably a number of things I might say along this line, although I should be glad to have the privilege of extending my remarks if this hearing is to be printed, and if we have the privilege of revision.

But, to come to the point, the power to regulate commerce, in my judgment, is the power, so far as interstate commerce is concerned, which the States originally exercised in the confederation. I may be wrong, but I happen to be one of those who does not believe that any of the powers of sovereignty were lost in the transition from the Confederation to the organization of the Federal Government by the adoption of the present Constitution. Senator Bacon very clearly elaborated those views, that many of us have believed in, in the report four years ago, when these bills were before the Senate committee, and some very distinguished gentlemen on both sides of the political fence have elaborated those same views, that they do not believe that somewhere in the shuffle—between the Confederation and the adoption of the Federal Constitution—the two sovereignties acting together have lost any of the powers that were formerly possessed by the several States.

Senator BORAH. Has anybody ever elaborated the other side?

Mr. DINWIDDIE. I have not heard it. I have heard the statement made over and over again that the States can not exercise the powers we are claiming now, because that is settled by the Supreme Court through a long period of years by a long line of decisions ever since the Rhodes case; but our friends on the other side content themselves with the suggestion that Congress can not prohibit interstate commerce in intoxicating liquors. When it comes to proof why Congress can not do it, I have not had any proof submitted to me that was at all satisfactory.

But I do not want to rest this case on a mere academic question. I do not think it is necessary for us to go back and attempt to prove our case by citing the powers that the States exercised and unquestionably possessed in the Confederation and then argue the question that none of that power has been lost to both sovereignties when they act together.

We have here evidence of the fact that Congress has, through a long period of years and upon a number of subjects, exercised its power to regulate interstate commerce to the point of absolute prohibition.

In the first place, the case of *Champion v. Ames*, popularly known as the lottery case, goes directly, in my judgment, to that point. Congress there specifically exercised its power to regulate interstate commerce to the point of prohibition, forbidding the uses of the instrumentalities of interstate commerce for the transportation of lottery tickets.

Senator BORAH. Where is that found?

Mr. DINWIDDIE. In 188 United States.

Senator BORAH. What was the title of the case?

Mr. DINWIDDIE. *Champion v. Ames*; found in 188 United States, page 321.

Senator BORAH. If those lottery tickets had been wheat, could they have prohibited its importation?

Mr. DINWIDDIE. That is a question that is pretty hard to answer. I doubt if that prohibition would have withstood the test.

Senator BORAH. Then you come to this proposition: That the liquor traffic is one that would come under the ban of being evil commerce?

Mr. DINWIDDIE. Yes, sir. I know that question has been raised over and over again. It was raised the other day on the House side, and I thought for a little while that I was "stumped" for an answer. I had argued the proposition that the powers of Congress were plenary, and had the hardihood to quote Chief Justice Marshall in an old case, but a leading and influential case, touching interstate commerce, when he said that the powers of Congress to regulate interstate commerce were plenary, acknowledging no limitations except those set by the Constitution itself, and so forth—you know the quotation. Then I was immediately asked a question similar to the one that Senator Borah has just asked. But I want to go further in quoting the Chief Justice. He said that the only restraining influence, practically, on Congress is their own discretion and common sense, and the wholesome fear of their constituents; that it is practically the same power that Congress has to declare war. I think I am absolutely right about that. I have studied it since. The answer was given on the spur of the moment. I was reminded of the old saying that "Fools rush in where angels fear to tread," because I am not a lawyer, and many a lawyer might hesitate to answer a question of that kind directly. And yet I believe I am right about that answer. I do not believe Congress could go so far as to stop the transportation of breadstuffs and other articles that go through the channels of interstate commerce, which are wholesome and make for the material and moral welfare of the country. I believe such an attempt would come up against the provision of the Constitution guaranteeing certain rights which we inherently possess. Even those rights are subject to control and regulation, but when it comes to saying to a man that he shall not transport through the channels of interstate commerce an article which confessedly makes for the comfort and happiness of the people, I think legislation of that kind would probably fail. But in the first place such legislation will probably never get to the courts, because Congress is not going to be foolish enough to pass legislation of that kind. In the first place, we can rest upon the proposition that Congress will always exercise common sense and the discretion that the Chief Justice said they would exercise. I think that statement is in the case of *Gibbon v. Ogden*, found in 9 Wheaton.

Senator BORAH. I think that is the case.

Mr. DINWIDDIE. I think that answers the question. I am frank to say that I believe that kind of legislation would fail if it were passed. But it would fail, not because Congress has not plenary power to regulate interstate commerce if it chooses, but because that is one of

the limitations on the power of Congress to regulate, which does not exist anywhere with reference to intoxicating liquors.

The difficulty which our friends on the other side of this question fail to recognize, but which they will more and more have to recognize, I think, is that there is a vital difference between the traffic in intoxicating liquors and the traffic in other classes of commodities. I do not need to read it now, but I will refer to the case of *Crowley v. Christian*, found in 137 United States, page 89. That is a case coming up from California in which the Supreme Court said that "it is not a right of a citizen of the United States to engage in traffic in intoxicating liquors, that that is not a right of a citizen of a State or a citizen of the United States"; but I think it is a right of a citizen of a State to engage in the traffic of making bread and grinding wheat, but even such natural and inalienable rights are subject to regulation and control for the common good of society.

In this case Mr. Justice Field, speaking for a united court, said:

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the constitutions of the several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment, and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable, when they shall be in writing and when they may be made orally, and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured, or sold require also special qualifications in the parties permitted to use, manufacture, or sell them. All this is but common knowledge and would hardly be mentioned were it not for the position often taken and vehemently pressed that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralization it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times by the courts of every State, considered as the proper subject of legisla-

tive regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold; and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality and not of Federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States.

Senator BACON. Coming back to what I said a moment ago, I would suggest, with the approval of the chairman, that in revising your remarks you can insert extracts from different cases.

Mr. DINWIDDIE. I thank you.

Senator BACON. So that they may appear without taking up the time that would be required to read them now.

Senator NELSON. That is a good suggestion, and I would advise you to incorporate some of those cases in your statement.

Mr. DINWIDDIE. I will be glad to do that.

I say, touching on the decision in 188 United States, about which I was questioned a moment ago, that decision went to these two points, as you will remember. I am quite sure you have read this decision. It is in the lottery case. There was a strong dissenting opinion. I am inclined to think there was a dissent by four judges, led by the Chief Justice; but that is neither here nor there—the dissent is not the law. The law is that lottery tickets are articles of interstate commerce and that legislation by Congress prohibiting their introduction into and transportation through the channels of interstate commerce is forbidden, and that is a constitutional enactment by Congress. That is what the *Champion v. Ames* case decided.

We do not have that difficulty to confront with respect to intoxicating liquors, because the great difficulty all these years has been that the courts have distinctly held—and they held the same way last week in a decision handed down, a week ago Monday—that intoxicating liquors were commodities of commerce and were subject to protection, and that after once going into interstate commerce must be transported and ultimately delivered to the consignee before the State jurisdiction can attach.

That is not all. You will remember that three years ago next March you completed the revision of the Penal Code of the United States, and as the result of long deliberations by a subcommittee, on which three of the Senators who are in this subcommittee were acting, you adopted what is known as sections 238, 239, and 240 of the penal code, which respectively require that there shall be a bona fide consignee for intoxicating liquors shipped in interstate commerce; that there shall be no collect-on-delivery shipments of intoxicating liquors; and that there shall be a plain branding on the outside of the package of all intoxicating liquors shipped in interstate commerce, showing the kind and quantity of liquors contained in the package,

and giving the name and address of the bona fide consignee. Those amendments were passed when the revision of the penal code took place three years ago, and went into effect the 1st of January, 1910.

Now, I am not going to refer to these. It is not necessary. But I refer to section 241. The three named, I admit, are purely regulatory amendments. None is distinctly prohibitory except the C. O. D. provision, which is a direct prohibition. But even that was not necessary, if the common carriers and express companies would themselves refuse to take liquors C. O. D., because it has been held over and over again that the collection of the price of articles shipped through the channels of interstate commerce is not regularly the business of an interstate carrier, and some of the railroad companies and express companies had previously declined to go into that business. But this legislation by Congress three years ago settled it and forbade it absolutely.

But I do not get my point out of the liquor amendments to the penal code, but section 241, which immediately follows, says:

The importation into the United States, or any Territory or District thereof, of the mongoose, the so-called "flying foxes" or fruit bats, the English sparrow, the starling, and such other birds and animals as the Secretary of Agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture, is hereby prohibited; and all such birds or animals shall, upon arrival at any port of the United States, be destroyed or returned at the expense of the owner.

That is a direct prohibition by Congress of legitimate articles.

Senator BORAH. That was within the Ames case?

Mr. DINWIDDIE. I think so, clearly so. And without taking the time of the committee I may say that section 242 of the penal code, which immediately follows that, goes on to absolutely forbid the importation of any foreign animals.

SEC. 242. It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States, to any other State, Territory, or District thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped in violation of the laws of the State, Territory, or District in which the same were killed, or from which they were shipped: *Provided*, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or District in which the same are captured or killed: *Provided further*, That nothing herein shall prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowls.

Sections 237 and 245 go exactly to the same lengths as to lottery tickets and obscene literature, and so on. I am particularly anxious to call attention to that because that is on all fours with the Kenyon bill and the McCumber bill. Congress has acted to the point of prohibition as we urge and there is no constitutional reason why different reasoning should be applied to intoxicating liquors. The *Crowley v. Christensen*, *Mugler v. Kansas*, and dozens of other cases confirm that.

Senator BACON. I will say that these sections did not originate with that enactment. They were statutes that existed prior to that time.

Mr. DINWIDDIE. I am glad that you have called attention to that fact.

Senator BACON. The legislation in regard to those animals was passed in 1900.

Mr. DINWIDDIE. Yes; 10 years ago or more, and similar enactments have been carried and enacted many years before, and on the face of all of these facts I can not see where the opponents of this legislation have anything to stand on when they claim that as touching intoxicating liquors they want to take that out of the class in which other legitimate articles of commerce are included, they want to take intoxicating liquors out and say that as respecting intoxicating liquors, you can not prohibit the uses of the instrumentalities of interstate commerce for their transportation.

There can be nothing cited, in my judgment there has been nothing cited, through all the years of this discussion that goes to prove the inability of Congress to pass this legislation constitutionally. That is not all. Just one thing more in that connection. That is, this proposed legislation is on all fours also with the food and drug act. You will notice that in this proposed legislation we are not trying to subject at any earlier period of time than the Wilson law does as now construed by the Supreme Court the articles of interstate commerce, so that there may not be any squint at all toward a delegation of power to the States, nor any effort to give extraterritorial effect by halting an interstate-commerce shipment at the State line. There is nothing like that about this legislation. It is a complete enactment by Congress itself. It is not aimed at the lawful traffic in intoxicating liquors. It is not aimed at what is termed the "personal use of intoxicating liquors." Our dear German-American friends have not any business opposing this kind of legislation. In the first place, two members of this committee who are present have already affirmed—and I think Senator Rayner joined in that suggestion; I know Senator Knox did in the previous subcommittee report—that there is no Federal question raised when it comes to personal use of intoxicating liquors or the importation of liquors from another State for personal use. That is a matter that is within the purview of State authority anyway, and it has no business to be lugged in here for the purpose of arraying sentiment against the passage of legislation proposed to give the State necessary redress against the evils of which we complain.

Now, what do they want to do? The States want the privilege, so far as the internal liquor traffic is concerned, to judicially determine by process of their own State courts whether liquors are there for valid or for unlawful purposes. If they are there, as I said a moment ago, for lawful purposes, they are not to be interfered with. If they are there for unlawful purposes, the State ought to have the right to interfere with them. That is practically the bone of our contention.

But where a State now proceeds under its State legislation and they have evidence that there is coming into the community a shipment of intoxicating liquor that is consigned to a man they believe proposes to use those liquors in violation of law, that that man is a boot legger or keeps a "blind tiger" or speak-easy, whatever you may call it—out West they call it one thing and down South another. I think down South they are chiefly called blind tigers. In Ohio, where we are used to some of the finer qualities, maybe, of politics, we call them speak-easies, but whatever the name may be—

Senator BACON. It is a more dangerous animal as it gets further South.

Mr. DINWIDDIE. But whatever they may be called, the State wants to find out whether those liquors are there for a legal or an illegal purpose, and to get jurisdiction of them.

Now the process is this: It can not seize the liquors summarily and destroy them. There is not a law in any State in the Union that would be upheld if it attempted any process of that kind. These are lawful judicial proceedings that the States indulge in in order to get possession or find out whether the liquors are there for proper purposes. It is what every lawyer understands by a proceeding in rem, to determine whether the liquors are there in violation of law or not.

What we find ourselves up against is this: That when a State, through its proper officer, issues a search warrant and the officer is directed to go and search certain premises, and if he finds liquors, to seize them and bring them into court, to determine their status, they are up against Federal injunctions. It would not be quite so easy to do that now, since the Federal Code has gone into effect on the 1st day of January, but it was before, and in one State I referred to, they can not try it again because they are liable to be sent to jail for violating the injunction; if they try it in the State of Oklahoma the two Federal judges have enjoined all the officers of the State down to the constable in the township against enforcing what has been held to be the valid legislation of the State, as touching liquors shipped in from the outside. So the States where that is done can not even determine whether their liquors are interstate commerce or not. That is an intolerable situation.

There is a way of determining this thing. Suppose the liquors are misbranded. Suppose they are adulterated, or suppose they are shipped in violation of the food and drugs act. They can not determine this question by the ordinary State process without running the risk of being enjoined by the Federal authorities. Now, what we are trying to do by this law is for Congress simply to say that liquors which are shipped into a State for the purpose of violating the laws of a State shall be prohibited. I do not need to go further into it. You will see it is an entirely different proposition. This legislation has been devised out of the experiences of the States in trying to reach this thing through the law as it has been declared by the Supreme Court. We believe it is perfectly competent for Congress to pass this legislation, because a law of this kind would be full and complete. It would not be any delegation of power to the State at all. Its enforcement would not depend upon any State enactment, and in my judgment it would give the States the remedy which they need to determine these questions judicially for themselves.

If the liquors are there for lawful purposes, the consignee gets them. If they are there for unlawful purposes, the State legislation operates with full force and effect.

Now, with the privilege the committee has very kindly suggested, if there are no questions, I think I shall desist, in view of the fact that there are others who desire to be heard.

Senator BORAH. I have read over the bill rather hastily. Am I correct in understanding that in States where they have passed a prohibition law or local option laws, and where liquor has been prohibited, that this bill if it became a law would prevent the shipments as an absolute proposition into those States and Territories?

Mr. DINWIDDIE. No; that is not correct.

Senator BORAH. Then please explain to me just what it does do.

Mr. DINWIDDIE. It would not prohibit—

Senator KENYON. It prohibits importation for unlawful purposes

Mr. DINWIDDIE. That is correct. With that qualification I answer in the affirmative. But the question is raised, as to whether it will prevent the introduction for purposes of personal or family use, and I would answer that negatively, unless the law of the State itself prohibits such use.

Senator BORAH. Suppose the law of the State was an absolute prohibition. It seldom is; but suppose it was. Then this law would prohibit—

Mr. DINWIDDIE. This law would prohibit the shipment of liquors into the State if they were intended to be used in violation of any law of the State. But there is no State law now anywhere in the United States forbidding the personal use of intoxicating liquors. But I am frank to say that I think it is an entirely defensible proposition. I think the law of the State, whatever that law may be, ought to be enforced and have the opportunity of being enforced without trammel from the outside.

Senator BACON. I understand the differentiation you make to be this: If a State has a law prohibiting the *sale* of intoxicating liquors and no law which prohibits the *use* of intoxicating liquors, when a shipment was made into a State if this bill should become a law it would be a question for the court to determine whether the consignee intended those liquors to be used in violation of law or for use *not* in violation of law.

Mr. DINWIDDIE. Exactly; it is a judicial proposition.

Senator KENYON. That is a very troublesome question in this matter, which must be a matter of fact. That question has bothered me. Here is John Smith who has a shipment for his own use. Query: Is it for his own personal use or for some illegal purpose? That is a question for the court to determine; that is the difficult question.

Mr. DINWIDDIE. That covers the point, I think. That is all we are attempting to do. I think those other questions are extraneous. The beauty about this law, as Mr. Webb expressed it to me the other day, is that it expands or contracts with the legislation of the States. I call attention in that connection, however, to the fact that we have to do nothing further in my judgment than would have to be done in the case of the Curtis bill or the Sheppard bill or any other bill of like import in the matter of proving "intent" under this proposed law.

Unless there is some other question to be asked, or unless some of the Senators present desire to be heard, I should like to introduce some of these ladies present.

Senator NELSON. Senator McCumber, do you desire to say anything?

Senator BACON. If the Senator will pardon me, I would suggest that the Senators who have introduced bills on this subject will have opportunity some other time.

Senator McCUMBER. I was going to suggest myself, that that is the case, and that we might be heard any time.

Mr. DINWIDDIE. Then I am glad to introduce Mrs. Margaret Dye Ellis, who is the legislative superintendent of the Woman's Christian Temperance Union, and she will introduce other speakers.

Mrs. MARGARET DYE ELLIS. Mr. Chairman and gentlemen, we are not expected to take very much time, although we are quite large in numbers this morning. I should like to introduce a few of our

leaders. First, I will introduce Mrs. Lillian M. N. Stevens, the President of the National Woman's Christian Temperance Union, and also president of the Woman's Christian Temperance Union of the State of Maine.

**STATEMENT OF MRS. L. M. N. STEVENS, PRESIDENT OF THE
NATIONAL WOMAN'S CHRISTIAN TEMPERANCE UNION.**

Mrs. STEVENS. Mr. Chairman and gentlemen of the committee, I will not undertake to apologize for the presence of so many women here this morning, because the question under consideration is a question of the home, and we are here in the interest of the homes of the Nation, asking and pleading for better protection of the home against the home's greatest enemy. I represent, as Mrs. Ellis has suggested, the largest organization of women in the world, and at our last national convention, when every State and Territory and the District of Columbia were represented, we passed unanimously a resolution pledging ourselves to do all we could toward securing some legislation like that which is now under consideration before this committee. And I may say also that every State Woman's Christian Temperance Union has taken similar action.

My home is in the State of Maine, a State which longer than any other State has had a prohibitory law. It has kept that law year after year for more than half a hundred years, notwithstanding the repeated and continuous effort for its repeal. The law has been of great advantage to the State. It has been a blessing to the State. The greatest complaint brought against the law is that the law is violated. This violation of the prohibitory law of Maine is made easy because the State does not have control or jurisdiction of the subject within its own borders. The State of Maine long ago outlawed the manufacture of liquor in the State. It has no breweries and no distilleries. No intoxicating liquor has been manufactured in Maine for 50 years or more. And yet it is sold there in defiance of the State law which prohibits its sale for beverage purposes. It seems to me it is fair reasoning that it is not right for the State of Massachusetts, for instance, to violate or break the laws of our State.

Gentlemen, I am not going to weary you; at least I trust I will not, because Mr. Dinwiddie has very ably and at length reviewed the whole question; but to illustrate what I mean in regard to making it easy for the violation of law last summer one day I saw in the sheds of a steamship company in Portland, Me., something which I knew very well was a consignment of liquor. It bore the name of a well known dive keeper. We call them dives in Maine, although lately since we have come to think so much of our southern friends we also call them blind tigers. This man was a well known violator of the law, a notorious keeper of a blind tiger. He had paid his fine over and over again, and he had been in jail. And yet this liquor was consigned to him. It had not been delivered to him; it was in care of the steamship company. I wished then that I had been sure that I would have been upheld in reporting that this liquor was there, that under the search and seizure law it might have been seized and taken care of as it ought to have been, but I knew very well that I could not do it because we lack just the protection we are here pleading for to-day.

Now, you may say: "You are assuming all that." I clipped this from the Portland Morning Press the other day when I was leaving my home city:

STEAMSHIP COMPANY'S RUM—CLAIM OF THE STATE HAS BEEN WITHDRAWN.

I will not weary you by reading it all—

The claim made by the State that a quantity of liquor siezed by the deputy sheriffs in the sheds of the Eastern Steamship Co., has been withdrawn and the liquor will be returned to the steamship company.

It was still in their care, had not been delivered to the consignee—

These were among the seizures of liquor made by the deputies of Sheriff Moulton, being two of the largest, and the goods were all consigned to parties in this city. The claim was that they were still in transit and had not been delivered to the consignees.

Now, the consignees to whom they were delivered were the keepers of these "blind tigers." Then you ask, "Could they be seized there?" Yes, they could have been, if found, but they are hidden away. They have their hiding places and it is very hard to seize the liquor after it has been delivered to the blind tiger consignee.

Now, gentlemen, in representing my State, I am also speaking for the women of other prohibitory States and prohibitory sections—I am glad some of them are here to speak themselves—we are here to appeal to you for the enactment of a law similar to that which is under consideration. So far as we are able to construe law—you gentlemen are able to do it—we approve the Kenyon Bill, and, studying it carefully, having in view all that we have suffered, all that we are suffering in prohibition States for lack of protection, because we can not control this question within the borders of the State—I believe that the provisions of this bill enacted into law will give to Maine and will give to the other prohibitory States, and prohibitory sections, the protection which the homes of the State ought to have; and so on behalf of the women I make this appeal. (Applause.)

Mrs. ELLIS. Georgia is well represented, Mr. Chairman, and I should like to introduce a woman from Georgia who reached the city this morning. We call her our talking cyclone—Mary Harris Armor.

STATEMENT OF MRS. MARY HARRIS ARMOR, OF GEORGIA.

Mrs. ARMOR. Mr. Chairman and gentlemen, I think they selected me because I can talk faster than any of the 16 other persons present. I wish I could say as much in my time as all 16 of them if each had as much time as I have.

I am here to represent preeminently the women of the State of Georgia—the homes of Georgia—and I represent also, when I speak to-day for this bill, every right-thinking man and woman, every patriotic citizen of the State of Georgia, and I know whereof I speak. If you do not believe it, look at the recent election in Georgia, when Dick Russell came out and stood for liquor. He thought if he got on a liquor platform he could be elected. Joe Brown stood for the law as it was, without coming out strongly one way or the other. Pope Brown stood square for prohibition. I am talking about the last primary in Georgia. Pope Brown stood for the enforcement of the present law, for the improvement of it, the abolition of the "near-beer" saloon, so called. With two men standing for prohibition we wiped Dick Russell off the face of the earth. He was beaten five

times. He was beaten twice by Joe Brown and three times by Pope Brown.

I am here to ask you to give us protection in the enforcement of our law. The only thing that dampens my ardor at all is that it seems an insult to your intelligence to plead with you for the passage of this bill. It is the most reasonable thing that could be asked. The Kenyon bill asks that you will not allow the United States Government to come into Georgia and violate the Georgia law. All that we ask is that you will not set the example of law violation to the people of this great Nation. All we ask you to do is that you will make intoxicating liquor coming into Georgia subject to the laws of Georgia.

One of the gentlemen has asked whether such a law could be applied to the importation of wheat. I am very glad the question was asked. Suppose wheat or corn came into the State—let us say corn, to be eaten by horses—and suppose that that corn was rotten, and yet a set of rascals were sending it into the State because they found a sale for it there, in order to make money; and suppose we knew it was giving the horses pelagra or blind staggers? Then suppose a law was enacted prohibiting its importation. I know the United States Government would protect us in a law like that. Gentlemen, the liquor that is brought in is worse than any rotten wheat or corn that could be brought in. [Applause.]

I have not very much time this morning to speak, but I am going to speak to-night, and I think that Congressmen ought to come and hear me. I demand a square deal. You Congressmen are too busy, and you think you are too big folks to hear Mrs. Stevens and myself speak; but I tell you we could teach you something. The reason I say so is not because we think we are smarter than you—although really I think Mrs. Stevens knows just as much as or more than any of you gentlemen—but I know some things that you do not; because God put brains in my head as well as in your head, and I have been trying to use them. I state the exact truth when I say that alcohol, no matter where you find it, is a double poison. It is a narcotic and an irritant and a poison to the brain; and just as harmful as any drug, like morphine or opium, which you prohibit.

Going back to the wheat and corn proposition. Is the stuff we are objecting to a legitimate article of commerce? Understand, this proposed law does not prohibit it for medicinal purposes, but would simply constitute a protection against the violation of our State law. Now, when we know that this is a thing such as I have described—and no intelligent physician denies it; if any physician does, he is not intelligent; he is 50 years behind the times—when we know that it is coming in for beverage purposes, then I want to say that if the United States Government has a right to protect dogs and cats and terrapins, and has a right to dump cold-storage eggs in Washington in the sewers, why have you not a right to stop the shipment of this double narcotic brain poison?

I am no lawyer, but I have read law some, and I have good sense, and I have studied the Constitution of the United States, and I say no matter who the Congressman may be who stands up and votes against this thing because of its alleged unconstitutionality, he is a mighty poor lawyer. That is what I believe, and you will never convince me of anything else.

The gentleman raised the question—and I am so glad these questions are raised, because I believe we are here to try to answer any questions that may be asked—they want to know when this liquor is shipped in, and this and that and the other about the law. You have not got to settle that. Georgia settles whether it is a violation of the law, and then it can be carried to the Supreme Court. It simply says that Georgia's law in reference to intoxicating liquors shall not be violated. Our law has been decided to be constitutional; the prohibition laws in other States have been decided constitutional. The liquor men have done their best to tear them down, but case after case has gone up to the Supreme Court, and they have stood the test of the Constitution. Now, then, if our law is constitutional, then this law is constitutional. [Applause.]

I am not going to take up further time, except to say that I want this proposed bill passed for three reasons: I want it for the protection of our homes; I want it for the honor of this Nation, and because it is a disgrace to this Nation to refuse us this law and come into our State and violate the State law and teach our boys that it is right to violate any law; and I want it for the redemption of our children.

Gentlemen, my speech is finished. It will be continued to-night at the First Congregational Church. Mrs. Stevens is going to speak there, too.

Now, I want to introduce to you one of the most distinguished men in America to-day, a man with a heart as well as with brain—and I wish that any man who has no heart did not have any brain. He is here to speak for Georgia, and there are 15 stalwart Georgians here who would be glad to speak and 15,000 at home who would speak if they could. [Applause.]

STATEMENT OF REV. HORACE M. DU BOSE.

Dr. DU BOSE. Mr. Chairman and gentlemen of the committee, the request for the favorable consideration and recommendation of the bill now pending before this honorable committee is, as your petitioners feel and believe, no ordinary submitment, either as to the volume of testimony behind it or as to the object which it has in view. In fact, gentlemen, it involves the social, the moral, and the commercial well-being of millions of American people, in eight cases, at least, composing the entire people of the Commonwealth making the petition, and in the aggregate, including the districts of the other States interested, the majority of the population of the Republic.

Our needs are pressing and great, and it is in the interest of helpless multitudes that this request is laid before you.

A Presbyterian clergyman of my acquaintance once treated me to a bit of his experience. He was at that time preaching in the State of Kentucky. There was attendant upon his ministry a typical old Kentucky colonel, who, as some of the gentlemen of that interesting old Commonwealth are, was largely given to his cups. After much cultivation of the acquaintance of this Kentucky gentleman my ministerial friend thought he might make advances of admonition to him. He told him that he did not think he ought to drink. The Kentucky gentleman had never heard of such an idea. The idea of a man not drinking! Said my friend, "I believe it would be good for your influence in the community not to drink." The Kentucky gen-

tleman answered, "That is no argument, because I have no influence, anyhow." "Well," said my friend, "I believe it would be good for your health not to drink." But that argument did not prevail. Then my friend insisted, "If you did not drink it would lengthen your days." "Yes," said the Kentucky colonel, "I stopped drinking once for a day, and it was the longest day of my life." [Laughter.]

I understand how presumptuous it would be for one from the Provinces to come to instruct the constituted lawmakers of the Nation, but I beseech you that you hear me regarding a few matters that bear upon the bill now pending before this honorable committee and that illuminate the way to its passage.

In the first place, I will speak modestly with reference to some aspects of the legal situation treated by this bill, for I take it that this inquiry and hearing is for the purpose of determining the legal relations of this legislation, and particularly as to its admissibility under our great national charter, the Constitution of 1787.

I fully understand the Articles of Confederation of 1787 are no longer the law of the land, but they are, as was very lucidly shown by the distinguished gentleman who opened this argument, full of light and illumination. Indeed, their light is like the red rays of the sunshine which have in them the power of healing and fructifying.

In that document it was clearly provided that the States might prohibit the importation or the exportation of any class of goods or commodities. I understand that this reservation of rights by the States, or this constitution of rights for the States, was grounded in moral considerations. But it looks directly to the end of the provisions of this bill as I have read and studied it. Perhaps that provision, although it is now archaic as constitutional law, was for the purpose of enabling any of the States in the original federation to prohibit the importation of African slaves, a question which even then had assumed a large moral aspect.

But whether this be the case or not, it clearly leads in the direction of this bill, and it serves to show what were the large moral ideals in the minds of the makers of our original Constitution. But granting this provision in the ancient and archaic Articles of Confederation is no longer law, it is also clear than in the newer Constitution, the one which now obtains in its broad and perpetual authority, it was provided—and the provision stands—that the States of the Union—if I do not misread that important document—that the States of the Union may levy an import tax upon commodities to the extent of providing a revenue for the execution of their inspection laws.

I do not know, indeed, for I am not thoroughly informed upon the history of the advance, the interpretation and application of these constitutional matters; I do not know, indeed, if this privilege has ever been invoked by any of the States, but I do realize that if by consent of Congress, as is provided in the Constitution—for this legislation, as the Constitution reads, may only be secured by the consent of Congress—if the Congress consents that the measure now pending should become law, and should give it application and force, it will complete, as I humbly interpret it, and must interpret it, this idea of our constitutional provision.

But, if that be not forceful, I cite you to the further fact that in one of the fundamental provisions of that instrument the Congress of the United States is given power to regulate commerce with foreign nations

and amongst the several States of the Union, and also with the Indian tribes. And in pursuance of this right, gentlemen, a thing too familiar to you for me to need to cite it—and already attention having been called by the honorable gentleman who opened the debate to this, the Congress has so regulated commerce with the Indian tribes as to prohibit among the Indian tribes the sale and disposing among them of ardent spirits and intoxicating liquors—I now pointedly raise the question as to whether the sovereign peoples of the Commonwealths of the Union are not entitled to the same protection, are not entitled to the same consideration as are the red Indians upon our western frontier.

Indeed, I pause here to say that there is involved, there is directly involved, in this problem the interests and well-being of a large number of our population, a half score millions of human beings, centered chiefly in the States of the South, and particularly in the States that have prohibitory legislation whose interests and whose cases are as urgent and as important in this matter as the case of the red Indians upon the Bad Lands of our western frontier—the vast negro population, whose presence and whose relation to our industrial body as laborers has indeed made this legislation not only possible, but made it necessary, particularly in the large States of the South.

It is in their interest, as well as in the interest of the large Anglo-Saxon population, that fine type of southern whites who have rights, inherent rights, rights in the largeness of their consciousness and in the elements of their innate nobility, that clamor in your ears for the favorable consideration of this bill and for its final passage and its effective application by Congress.

The whole question therefore in this bill is with reference not only to the legal rights of States, but to the moral rights of people who are in these States.

I would not pass from this point without availing myself of the opportunity of emphasizing another aspect of these rights, and that is the mutual obligation of the Federal Government and the States of the Union to protect the moral needs as also the social well-being and the peace of the peoples. I do not speak from the standpoint of a lawyer, for I am no lawyer, but from the standpoint of a philanthropist and a religious teacher. It was evidently supreme in the minds of the fathers and makers of the Constitution that these large interests, involving the moral and social well-being of the people, should be adjudicated and administered in a large sense as a joint responsibility by the Congress and by the States of the Union. And there emerges again the cause of these people of whom I have spoken, the large and indigent colored population, whose continued indigence, whose continued moral helplessness are due more largely to the ease with which they secure intoxicating liquors than to any other fact or condition. In order that I may compress my argument, I believe I would put it in a little parable which I am sure you can comprehend.

There was once a colored man, a typical plantation laborer, much given to his cups, and, as a result, was in the usual condition of indigence and poverty. He had a wife and one single child, a little colored boy of some 8 or 10 years, by the name of Toby. He had brought his wife and his child, as himself, to the verge of starvation, the little money he earned being scarcely more than enough to pay his liquor bill. So they lived in poverty, typical of so large a part of

that population. On Sunday evening Sam went to the colored church which was part of the complement of the plantation. He heard the colored elder preach a sermon, his text concerning the dream of Pharaoh, about the seven fat kine and the seven lean kine. It started in motion what little intellectual process the old negro had, and that night he dreamed a dream. He dreamed he saw three black cats, one being a fat cat, one a blind cat, and one a lean cat. In the morning he asked his wife to interpret his dream, after the manner of Joseph's interpretation of Pharaoh's dream. His wife replied, "Indeed, I can't tell you what it means." "You must tell me what it means," said the old man.

"No; I can't tell you nothin' 'bout what it means."

But Toby spoke up and said, "I can tell you."

"Get away from hyah, I want your mother to tell me." But his wife continued to protest that she could not interpret the dream, and as Toby insisted he could interpret it, the old man finally let Toby give his interpretation.

"The fat cat is a saloon keeper, daddy; the blind cat is you, and the lean cat is me and mammy." (Applause.)

A very simple parable in the language and vernacular of the plantation; but it describes our problem and illustrates our situation. These colored people who make up so large a part of our population are, in that large moral sense and in the light of that large appeal, as truly the ward, the wards, of the nation as are these people upon our western reservations, whom we feed out of the Government Treasury and protect with the strong arm of the law.

We are content, gentlemen, to leave this whole matter to the plenary power of Congress.

It sums itself up at last, as has been clearly shown here, and as I am sure you gentlemen know—I do not presume to instruct you in that matter—that it is clearly within the powers of this Congress to take in hand this legislation. The precedents are numerous, and the moral lessons and significance of these precedents are vast, and the need is urgent.

It is the will and wish of the dominant religious and moral elements of at least eight of the American States that such a law as this proposed should be enacted and should be enforced, and we come to you—to whom have been committed our interests, to whom have been committed the reserved rights which were originally the rights of the people—we come to you and ask in the way of a consciousness of our rights, and also in the consciousness of the luminous perception of the Constitution, and also conscious of the power you have in your hands, to bring us the correction, to consider the bill favorably. Commend it to the Houses of Congress and let us see it pass and the blessings of the wives and mothers not only of these eight segregated States that make a peculiar confederation in themselves, but the blessings of the motherhood, the sisterhood, the wifehood, aye, and the chivalrous manhood of this great nation, will rest as a benediction on your heads. May a pillar of cloud go before you by day and a pillar of fire by night and bring you into that strong fortress of decision and conclusion toward which we look as a consummation with confidence; and we also look forward to it with prayerfulness and with great respect and veneration for our national fathers. [Applause.]

Mrs. ELLIS. May I present Mrs. Boole, of New York, president of the Woman's Christian Temperance Union of that State?

STATEMENT OF MRS. ELLA A. BOOLE, OF NEW YORK CITY.

Mrs. BOOLE. Mr. Chairman and gentlemen of the committee, I represent the Woman's Christian Temperance Union of the State of New York. We are an organization with a membership of over 32,000 women. We are home women, we are Christian women, we are women who love our children and are vitally interested in finding a way of solving the problem as to how the homes of our State and other States may be protected from the curse of the liquor traffic. We believe this bill will help solve the problem in the States that have outlawed the liquor traffic. We believe its principles are in harmony with the laws of the country, and on behalf of these 32,000 women we ask your careful consideration and a favorable report. [Applause.]

Mrs. ELLIS. Just one more speaker, Mr. Chairman. I wish to introduce Mrs. George, president of the Pennsylvania Woman's Christian Temperance Union.

STATEMENT OF MRS. ELLA M. GEORGE, PRESIDENT OF THE WOMAN'S CHRISTIAN TEMPERANCE UNION OF PENNSYLVANIA.

Mrs. GEORGE. Honorable chairman and members of the committee and friends, I represent the Woman's Christian Temperance Union of Pennsylvania, 25,000 strong.

We are one of the original 13 States. Pennsylvania, you know, is the home of the old Liberty Bell, and from our State its notes rang out in clear and decisive tones, "Proclaim ye liberty throughout the land, to all the inhabitants thereof"; and we are asking to-day, honorable gentlemen, that liberty be given to these States who have banished the rum traffic from their borders, that their hands be untied, and that they may have the liberty to protect themselves. Is it not reasonable? Is it not just? We ask this and we plead with you that you will hear our prayer, and if you do we are sure the blessing of God will rest upon you. [Applause.]

Mrs. ELLIS. We have representatives here not only from the States from which you have heard, but also from Illinois, North Carolina, Massachusetts, New Jersey, Maryland, and Kansas, and I should like Dr. McLeod, pastor of the First Presbyterian Church of this city, to give you a message just received from Dr. Crafts, who is in Kentucky, as a message from the State of Kentucky.

Senator NELSON. We will be glad to hear Dr. McLeod.

STATEMENT OF REV. DONALD C. MCLEOD, OF WASHINGTON, D. C.

Dr. MCLEOD. Mr. Chairman and honorable members of the committee, as has been indicated, I speak as the mouthpiece this morning of the superintendent of the International Reform Bureau, Dr. Crafts. I have the honor to be secretary of the International Reform Bureau. This is the message I have received from Dr. Crafts:

To the Subcommittee of Senate Judiciary Committee having charge of hearing on interstate liquor bill:

The International Reform Bureau, being one of the 26 organizations that, after two days' thorough discussion, agreed on the bill now known as Kenyon-Sheppard bill, as the most available bill to remedy the nullification of State liquor laws through

Federal protection of interstate commerce, urges that speedy relief—this or some stronger bill—be given to the Southern States, where undersigned is now speaking in the interest of this bill, and where such interference with States rights is peculiarly exasperating.

As a way has been found to remove Federal protection from interstate shipments of powder and of yellow oleomargarine and lottery tickets, we appeal to the able lawyers of the Senate Judiciary Committee to find a way to remove that shield at least from interstate shipments of liquors consigned to those engaged in liquor selling in defiance of State law.

Respectfully,

WILBUR F. CRAFTS.

Mrs. ELLIS. Permit me now to introduce Mrs. George Green, of North Carolina, who would like to address you briefly.

STATEMENT OF MRS. GEORGE GREEN, OF NORTH CAROLINA.

Mrs. GREEN. Mr. Chairman and gentlemen of the committee, I am from North Carolina, and am prepared to state that the prohibition law in North Carolina has improved our conditions a great deal, and yet there is to a certain extent a lack of enforcement of the law.

On Christmas day last we had a tragedy that would bring home to anybody the practical results of the nonenforcement of the law. That tragedy was caused by the selling of whisky that came from a "blind tiger" to a young man who, under the influence of that liquor, shot down another young man on one of the street corners of my town.

We ask you, honorable gentlemen of the committee, to give us a favorable report upon this bill. We ask for protection in our homes in the matter of the enforcement of our laws. We want our laws enforced. We have, as I have said, an improved condition by reason of our prohibition law, but we want to be able to have our law enforced. Originally where we had 23 gallons of whisky consumed in our State we now only have 2 gallons consumed, and as you can see, that is a great improvement.

I have had an opportunity to go among the people, and I know of the improved conditions.

As a mother and as a citizen of the State of North Carolina I ask you honorable gentlemen to give us a favorable report upon this bill. [Applause.]

Mrs. ELLIS. I will introduce Mrs. Carter, of North Carolina, who will also address you briefly.

STATEMENT OF MRS. CARTER, OF NORTH CAROLINA.

Mrs. CARTER. Mr. Chairman and gentlemen of the committee, I did not come here in time to find out just where our North Carolina people were going to sit. I feel that I can not afford to let an opportunity go by without pleading and begging of you to pass this proposed law. It is something that we need very much in North Carolina. We have in Washington, N. C., about 6,000 people. We have convicted 25 "blind-tiger" keepers since the 1st of September; but we did not convict any until we women, I think I may say, got the recording judge, the recorder's court, on our side, and then the city attorney. The city attorney was to receive \$5 for every convicted case. So now, with this law that is proposed, the Kenyon bill, we can still handle the courts of North Carolina to a certain extent until it will do some good, and otherwise it will not do any good.

I want to state right here that I am there to work as well as I can, and I intend keeping behind every one of our politicians, because I am a politician myself to a certain extent. This morning I have tried to see our Senators, and I succeeded in seeing one of them. Senator Simmons was not in, but I succeeded in seeing Representative Small. I left word at Senator Simmons's office that I represented Hyde County and Beaufort County, and if there was anything he could say in our behalf we would be glad to have him say it; we would be glad to have him come here before this committee and say anything he could. Otherwise, if he was too busy to come I could appreciate the position that he might be in, because when I go back I will be busy until after election. [Laughter.]

I do not know anything about woman's suffrage, at least I have never felt any tremendous interest in it, although, of course, I am interested in the welfare of women and children generally; but after going around with petitions all over our town, and after a hard day's work, trying to get people to sign a petition, I knew something about the difficulty and the disagreeable features of such work. To go around getting people to sign a petition makes me feel like being right out for woman's suffrage; I felt like I would be a suffragette a dozen times over. The time must come when I will not have to go and plead in the way that I have done, and I want the time to come when my name will mean as much to Senator Simmons and Representative Small as the name of any man in my town. [Applause.]

So when I go back and they say that I said I was a woman suffragist in Washington, I will be glad they think I am. As I say, I want the time to come when I will not have to humiliate myself to get anything done or to get any petition signed that is in the interest of what is right and just.

I thank you gentlemen of the committee very much for your attention. [Applause.]

Senator NELSON. Are there any others that desire to be heard?

If there are no other ladies who wish to speak, are there any other gentlemen that you desire to be heard, Mr. Dinwiddie?

Mr. DINWIDDIE. There are quite a number here from Georgia that would probably like to speak, and I should be very glad to have them heard. Can I ask this question, Mr. Chairman? How much time do you anticipate that you can give to us?

Senator NELSON. I think we can stay here until 1 o'clock.

Mr. DINWIDDIE. I would like to have about two minutes for one further suggestion that I would like to make to the committee before you close your session.

(Mr. A. W. Evans, of Georgia, was introduced.)

STATEMENT OF MR. A. W. EVANS, OF SANDERSVILLE, GA.

Mr. EVANS. Mr. Chairman and gentlemen of the committee, in Georgia we have a prohibition law. Let it be said here—and it can not be successfully denied—that Georgia is in an incalculably better condition than she was before the enactment of the State prohibition law. [Applause.]

Statistics will prove that the amount of whisky consumed in our State is less than ever in the history of our great State.

We are very proud of the fact that we accomplished State prohibition as the pioneer of our Southern States. We set an example there which was very promptly followed by our neighbors.

It can be shown by statistics that the consumption of whisky has been very much less. It is true that two States contiguous to Georgia are not dry. The State of Florida, in which is the city of Jacksonville, is a wet State. In that State and in that city of Jacksonville are a great many wholesale liquor places. That State sends over into Georgia an endless stream of whisky.

We plead for the passage of this law for the reason that if you give us this law we can stop the importation of whisky for illegal purposes in Georgia. Depend upon us for that.

We do not undertake to say that no man has not the constitutional right to order whisky whenever he feels that it is necessary for his own personal consumption, or for medicinal purposes in his family; we are prepared to concede that; but we do know that 95 per cent of the whisky that now comes from our neighboring State, comes not for personal consumption in the sense that it is shipped in the original package to the consumer, but it comes to him who is dispensing it out to the consumer, it comes to what are called blind tigers. I live in the interior of my State and in that part of the State, and in fact all over it, we can soon spot, we can soon locate, him who is receiving whisky not for his own consumption. We are doing it now in a measure. We are using some of the statutes which we now have for the purpose of seizure, and we are convicting men of the illegal sale of whisky by the laws which we now have. But we are handicapped and all over the State—and other States suffer from the same thing—we are suffering because our hands are tied, because they plead at once the protection of the interstate commerce law.

Chattanooga and Jacksonville flood our country with literature from liquor houses. There is scarcely a mail that comes to my office that does not bring letters from whisky houses. They make it very easy to order whisky. If it is far removed, especially if it is removed a thousand miles away, the consumption of whisky will be reduced proportionately. I represent women, it is true, but I plead not only for women, I plead for the patriotism of the men of Georgia, for the men who stand for the right, and I plead for our grand old State; and if you give us this protection we will continue to increase, and it will be interesting to note the increase in our material resources in the last two years. It would astound some carping critics if they would study the increase. It is astounding. The great progress our State has made is remarkable. She is the Empire State of the South, and she hopes so to remain; but the great thing we need in order to keep up this progress is the law for which we plead this morning.

STATEMENT OF MR. N. E. MARSHBURN, OF LA GRANGE, GA.

Mr. MARSHBURN. Mr. Chairman, ladies and gentlemen, I want to give you a concrete example of our difficulty in dealing with the liquor question. I will not take long. We live right on the borders of Alabama. I am a merchant. We have in our neighborhood one concern which under the present law received on one day early

in December 3,200 pints of whisky; and on the 16th day of December, or thereabouts, from another station he received 2,000 pints more.

Senator NELSON. Does it come in pint bottles?

Mr. MARSHBURN. Yes, in casks, of 100 pints to the cask.

Senator KENYON. What is the size of the town?

Mr. MARSHBURN. Something like 8,000 people.

Senator BACON. Troup County is a good deal larger than that.

Mr. MARSHBURN. Troup County is a very large county, yes. I was notified before the whisky left the depot, I being president of the Law and Order League of that county, but I had no power to stop it. It was carried to the place of the purchaser, which was just outside the incorporated limits of La Grange, not more than 50 yards from the incorporation line; he there debauched our boys, the whole Christmas through, with that whisky. We pleaded with our sheriff to stop it. He said, "My hands are tied;" but, gentlemen, if we had the law that the Kenyon bill proposes to give us I would at once have sworn out a search warrant and searched the premises and put a stop to it. The purchaser of this whisky defies us. He rides openly through our streets. He is becoming one of the richest men in our section. The president of our bank told me not more than two weeks ago that this man had more ready cash at his command than any other depositor outside of the corporations in that town. Three years ago, or a few years ago before the prohibition law was passed, he was one of the poorest men we had.

You say the Constitution prohibits you from passing this law, or some of you intimate that. Have you not passed the law that prevents opium from coming into this country, except to a limited extent? Is it not so that there is only about 50,000 pounds of opium allowed to come into the country? Is not that so? Is it not true that you have passed laws that prohibit lottery tickets being distributed broadcast as they were when I was a boy 16 or 17 years old? I was brought up with one of the members of this committee. I have always revered him; I thought he was too big to be governor of Georgia. We have got him where we want him. [Applause.]

Gentlemen, give us this law and we will show you what we can do.

It is restrictive, you say? That is not so. The northern cities know a good thing; they are the quickest to grasp a good thing, and if you want anything done and you let the northern people know it, they catch hold at once. See how it is catching. See how other States are asking for this protection in the way of dry counties, not by States—which will eventually come—but by counties.

If you have got the power to stop these lottery tickets from going through the mails, why not have the power to stop your own postmasters from writing the money orders that go to these liquor houses? They do it. I have seen it done right there, by the postmasters, agents of the United States Government; they are writing out liquor orders. You say you can not stop it? Stop that part of it, at least, or stop the mails being flooded. I have never touched a drop of whisky, I have been a teetotaler from my birth up almost, and I do not know the influence of intoxicating liquor; but I get daily in my office anywhere from 3 to as high as 25 of these circulars, to which I have referred, advertising intoxicating liquors, and of all the mean stuff that they are offering you never saw anything to equal it.

They offer gallons of whisky at a nominal sum, proposing to prepay the freight, enticing young men and boys and the poor ignorant negroes, who can not withstand the temptation to order a little whisky. You know too well that the families of these negroes suffer for the want of the necessities of life by reason of the money that is spent for alcoholic liquors. If you will only do what we suggest it will go a long way toward stopping this nefarious trade in liquor in these dry counties. [Applause.]

STATEMENT OF MR. C. L. GREAVES, OF HAWKINSVILLE, GA.

MR. GREAVES. Mr. Chairman and gentlemen of the committee, I come to represent the moral forces of Pulaski County, Ga. Pulaski County is one of the black counties of the State. We have a very large negro population, and, I am sorry to say, it is one of the most lawless counties in Georgia. Ninety-five per cent of the lawlessness in the county, the sheriff tells me, is due to liquor that is brought in; and, on account of this liquor that is brought in, there are anywhere from three or four to a dozen murders committed in a year, nearly all among the negroes. It is a county in which the negroes meet together for their mullet suppers, suppers at which they have half a bushel, it may be, of mullets of uncertain age, and a gallon of whisky. Before morning everybody is drunk and razors and bullets are flying through the air. At such a debauch it is no wonder that frequently some negro is hurled into eternity and another one into the chain gang—for that is about all they ever do with them.

I am a friend of the negro, and I think every right-minded white man is. I am a friend of the negro, and I look out upon the county and see the debauchery and misery that is caused by it, and I come here to appeal to you for some such law as this, which will protect us. We appeal to both Democrats and Republicans. It is upon a slogan of democracy from the beginning, local self-government, that we appeal to the Democrats. I appeal to the Republicans because the Republican party has always felt that the negro is its peculiar ward. So I appeal to you both, independent of party, to see to it that the poverty-stricken negro is rescued from his enemies. Of course, we can not elevate them all, but we can accomplish a great deal. Perhaps you have heard of the negro who went into the store to buy a razor and the clerk tried to sell him a modern Gillette safety razor. He was not interested in it at all; he said he wanted a razor for social and religious purposes. [Laughter.]

I want to say that I think whisky is as bad for a white man as it is for a negro. It comes in by freight in that part of the country. A while ago I know nine barrels came in at one time, and a certain man got it and retailed it out. But I am glad to say that that man is on the chain gang now. We sent five white men to the chain gang to work with the large forces of negroes on the chain gang. It was an appropriate place; the white men found their old customers right there. We had to go into those men's places of business and seize it, and of course it would be much easier if we had a law which would make it possible to prevent it coming in.

So, as I have said, I come here to represent the moral forces of Pulaski County, and I also come to represent the old negro "mammy" whose son is doing time in the chain gang; and I also come to repre-

sent the white women. Before I left home I faced a committee of half a dozen members of the Woman's Christian Temperance Union, every one of whom is of a Georgia family of high standing, but of that number three lives have been made tragedies by liquor. One of them has a brother on the chain gang; she and that brother are the children of a gallant old Confederate captain; another has a husband that was a drunkard; another has a husband who is a fugitive from justice for committing murder on a drunken spree.

We come to you not as sentimentalists, but with the moral conditions of our home at stake and we plead to you in God's name to give us the relief we seek. [Applause.]

STATEMENT OF MR. W. B. STUBBS, OF SAVANNAH, GA.

MR. STUBBS. Mr. Chairman and gentlemen of the committee, I appear in behalf, primarily, of the Woman's Christian Temperance Union of Savannah, Ga.

I am not a constitutional lawyer, but there are two phases of this matter that appeal to me, two matters connected with the law, and I would like you to consider them in the determination of action upon this bill.

The first is that our forefathers who framed our Constitution wisely, it seems to me, provided that citizens of any State should have in all of the States the rights of the citizens of the other States. But it certainly never was contemplated that a citizen of Tennessee should exercise in Georgia rights which a Georgia citizen could not exercise. Surely that never was the spirit or letter of the Constitution.

Now, may I illustrate? A short time ago I was in Chattanooga, Tenn., which after a tremendous struggle passed the 4-mile law, which was practically a prohibition law. As I walked up and down the streets of that city I saw a wholesale whisky house, and I asked the citizens why that was there and the answer was, "That man can not sell whisky in Tennessee, but he can ship whisky just across the line into Georgia and sell it."

Now, gentlemen, as patriotic Americans, as sons of our Revolutionary fathers, I appeal to you that no matter what difficulty is in the way, our forefathers never contemplated that a man should come into the State of Georgia from the State of Tennessee and do things that were not permitted by the laws of Georgia to her citizens. [Applause.]

I have faith enough in you, I do not care what party you belong to or what faction in Congress you belong to, to believe that when you face that situation you will find a remedy for it, and if this bill gives a remedy I beg you, in the names of those women and thousands of foreigners who come to our shores and who are getting our ideas of liberty, to give us some relief—this bill or some other bill.

There is one other phase of it. In the city of Savannah, where our prohibition law, as is known to all men, is violated—and I am free to confess before this committee in standing for that law I stand in almost a hopeless minority—down there we have passed a law known as the "blind-tiger nuisance law." It puts a place where whisky is illegally sold on the footing of a nuisance and gives any citizen a right to prepare a petition to the judge of the superior court

for an order requiring the abatement of the nuisance, for the enjoining of the illegal sale, and for the abatement of the place as a nuisance.

Some of our citizens in one section of the town, a resident section, agreeing with these good women that we ought as far as possible to show our boys how to respect the law, determined to make an effort to enjoin, and we have indicted six of those men in that section of the city.

Now when we come to the matter of proof, we find to our dismay that the Federal Government is in a position where it is absolutely antagonistic to the enforcement of the law. The Federal law provides for a special receipt, as it is called, issued by the internal-revenue collector to a man who proposes to retail liquor, and also an application, in which he answers certain questions, and either of those is made prima facie evidence of the fact that the man is selling liquor, whether it be on the criminal or on the civil side of the court. Now when we apply to the Federal authorities for a certified copy of this special tax receipt or the application which this man has signed we are met with the proposition that it is not against the law of the United States for this man to engage in the retailing of liquors in the State of Georgia, and it is not the policy of the United States to help prosecute a man who is not doing a thing that is against the laws of the United States, and therefore they can not permit the internal-revenue collector to furnish us a certified copy of that which is made evidence by the laws of Georgia. That creates a situation which I believe as patriotic citizens you will remedy when you see it, and see that these States get their rights and have a right to enforce their laws. [Applause.]

MR. DINWIDDIE. Can I say one word in that connection, Mr. Chairman, for fear that there may be some misapprehension in regard to it? Doubtless many of the people, as has been disclosed, are interested in the enforcement of laws in respect to intoxicating liquors. Touching the matter just mentioned, I will say that if any man will bring to my attention a collector of internal revenue who refuses to abide by a law that Congress passed on the 26th of June, 1906, requiring a certified copy of the names of the men who have paid the special tax, the \$25, as retailers of liquors, I will see that it is brought to the Treasury Department's attention, and I guarantee from what has been said to me by officers of the Government that it will be made pretty warm for him because he is ordered to do it by the law that we helped to have passed.

As to record No. 11, I know nothing. As to record No. 10, which is a list of those paying the tax, they are required by law to furnish a certified copy to officers of local courts for the purpose indicated by the remarks of the gentleman who has just spoken.

SENATOR NELSON. I would like to supplement what you say. I had occasion, day before yesterday, to look up that same matter at the instance of parties in my State. There is a regulation of the Treasury Department which holds that they will furnish certified copies of these documents upon the order of the judge of the court. So, if a case is pending in court, if they get an order from the judge, they can get certified copies from the Treasury Department.

MR. DINWIDDIE. Yes; I wanted to make that clear, so we might not be under a misapprehension.

Senator NELSON. And, as you say, that record No. 10 is open to public inspection.

Mr. DINWIDDIE. Yes, sir; and is preserved by the collector. Anybody during reasonable business hours, can go there and inspect that record. Of course that involves nothing, so far as proof is concerned; but they can go there and get the facts upon which to base a prosecution in the presence of a law like the gentleman from Georgia suggests; and since the passage of the law of 1906 they can get the certified copy as evidence in the court.

Mr. STUBBS. I am very much obliged to you. I hold a letter from the revenue officer here on which I based my statement.

Senator NELSON. You can file that if you like.

Mr. STUBBS. The insufficiency of the law is what I was calling attention to. The law that Mr. Dinwiddie has in mind does require that an alphabetical list of the people in Georgia who take out special-revenue receipts, with the place where they do business, and what business they are doing shall be displayed in the office of the internal-revenue collector, and the prosecuting officer of the State can ask for a copy of that and get it; but here is a civil proceeding, and we apply for a certified copy of his application or his special receipt and we are met by the statement from the internal-revenue officer that under the laws of the United States he can not furnish it. That is what I am talking about.

Senator BACON. Please file that letter, or a copy of it.

The letter is as follows:

TREASURY DEPARTMENT,
Washington, January 24, 1912.

WILLIAM R. HEWLETT, Esq.,
Attorney at Law, 6-8 Citizens' Trust Building, Savannah, Ga.

SIR: I beg to acknowledge receipt of your letter of the 18th instant, requesting that Collector Jackson, of Atlanta, be instructed to furnish you the original applications or returns on Form 11 of special taxpayers for use in proceedings pending against the parties under the State law prohibiting the sale of liquors.

In reply you are advised that the returns in question are made under compulsion of law for purposes in connection with the revenue of the United States, and should not be used for any other purpose.

The reason for this is plain. The sale of spirituous and fermented liquors is not a crime under the Federal laws, but is a proper subject for taxation, and a person making return for special tax can not refuse to answer any questions propounded to him on the ground that his answers may incriminate him because the business he proposes to engage in is, under the Federal laws, not a crime. Under the State laws, however, it is a crime, and if a person was put on the stand in a proceeding under the State laws he might refuse to answer because his answers would incriminate him, and it is for this very reason that it is sought to utilize the returns made to the United States, and thus secure, by indirection, evidence which is estopped by the Constitution from being secured directly—a proceeding to which the Federal Government can not be a party.

The right of the Secretary of the Treasury to the control of the files and records of the Treasury Department has been passed upon by the Supreme Court of the United States in *Boske v. Comingore* (177 U. S., 459).

Under the provisions of the act of June 21, 1906, a certified copy of record 10, showing the names of those persons who have paid special tax may be furnished to prosecuting officers by collectors of internal revenue, but this office accepts this as an expression of the legislative intent as to the extent to which this office should go in aiding prosecution of Federal taxpayers.

Your request must, therefore, be denied.

Respectfully,

R. E. CABELL,
Commissioner.

STATEMENT OF MR. W. A. HUCKABEE, OF DOUGLAS, GA.

MR. HUCKABEE. Mr. Chairman and gentlemen of the committee, I do not wish to make a speech. I want to ask a question, to which I do not expect an answer.

Will this bill, if enacted into law, make it possible hereafter for liquor licenses to be issued in dry States? The issuing of those licenses is one of the greatest troubles.

One other thing. My children call one of the antebellum negroes "Mammy" and she calls them her children. And when I go out over the State and look at the children of these old mammies, hundreds of thousands of them, who are to-day in bondage (worse bondage than slavery), in the chain gangs of the several counties—and it is not only so in Georgia, but it is so in all of the black belt of the South—my heart goes out to them. My heart aches for them. They are brought to that condition, gentlemen of the committee, through the influence of intoxicating liquors, and we are largely helpless. I just wanted to bring that matter to your attention. We love these old negroes; I am sorry that we do not love the young ones as much as we do the old ones. But we would if they could not get the liquor they get. If it were so that they could not get any liquor, they would be just as good members of the community as their ancestors. I certainly hope you will recommend the passage of this bill. It would be a blessing if you would do so.

I certainly hope that the Congress of the United States will give us who are in dry territory this relief that we seek. I believe you will. I have faith in humanity. I believe you will do it. I am looking forward to it. I am looking for more than that. I believe that in 25 years or less time we will have this glorious nation of ours free from alcoholic liquors. [Applause.]

We of the South are a trustful people; we have a conviction, founded in the eternal truth, backed by the infinite God. We are hoping, we are believing, we are trusting, and as long as the principles of righteousness and justice are in the hearts of our people and the infinite God is on His throne, failure will not be written in our vocabulary. Whenever old Satan shall succeed in ousting God from His kingly throne and is himself placed upon it, and whenever the principles of righteousness and justice die in the hearts of our people, then will we admit we are beaten, and not till then. [Applause.]

STATEMENT OF MR. W. A. CHASTAIN.

MR. CHASTAIN. Mr. Chairman and gentlemen of the committee, I come from Monroe, Ga. I have no speech, but I want to say that I represent the local Woman's Christian Temperance Union of Monroe, in Walton County, and to say that they had a rousing meeting recently and moved that I should come here and attend this meeting. Whenever five or six women—level-headed and brainy women—resolve in meeting that I shall go anywhere, I generally take the next train and go.

I am here for that purpose. They are trying to do things down there in Georgia. We are not asking you gentlemen to do what we can do for ourselves. We need this assistance from you. These women sent out letters over the county, 2,500, in the gubernatorial campaign,

and they are working at home and doing all they can for the cause in which they are so interested.

I have been told by persons that seem to know that they will guarantee that they can go to the express office there and can get a package of liquor, and they have never ordered any, and the supposition is that it is in the background, with a blank tag on it, and whenever a person asks if there is a package there, if he is initiated in the procedure, the express agent will go back and see and report the charges, and the charges are paid and the liquor is delivered.

I do not know whether that is true or not. I believe I can stand in one place and with a sling shot fire a stone that will reach five homes where there is a drunkard. Most of that is from liquor sold in blind tigers. I just want to emphasize the request and urge the passage of this bill. [Applause.]

Mr. DINWIDDIE. Time is getting short, and I would like to have Senator Kenyon say a word before you adjourn. I want to say just one thing. I think Senator Kenyon will allow me to do this.

I knew what kind of testimony we would have from our friends who are here this morning, and therefore I contented myself with speaking solely on what I thought was the constitutional or legal side. The matter was adverted to by one of the other speakers, but I want to call attention to another fact, and give the citations for it, and I think it proves the power that Congress has in the matter.

One of the leading Congressmen that will handle this matter on the other side of the Capitol came to me the other day and said, "You people over the country have won your case so far as the policy of this bill is concerned, Mr. Dinwiddie, and," he said, "you do not have to say anything to me about the policy of this legislation; there is no question about the fact that the States ought to have this remedy. What I want to know is, can we constitutionally give it to them?"

That is why I confined myself largely to the line of argument I followed this morning. After I got away from him I lit upon that section of the Constitution which, I think, shows absolutely that Congress has power to enact this legislation. We confuse things a good deal by not getting right down to the section of the Constitution which applies and reading it.

It says that Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Now, if Congress did not exercise the power to regulate commerce with foreign nations by prohibition at any time and if Congress did not, as I have shown it has, show its power to regulate interstate commerce in other articles by prohibition, there is an analogy here, and it has exactly the same power to regulate commerce with the Indian tribes, because from the beginning of the Government Congress has legislated on the line of the prohibition of the sale of liquor among the Indians. I have a copy of the "43-gallons-of-whisky" case. This was sent to me by an officer of the Indian Bureau upon another matter several months ago. This was taken from 93d United States. That legislation has been followed and upheld all through the years by the United States Supreme Court, and it goes clearly to the right of the Congress of the United States under its power to regulate commerce with the Indian tribes to absolutely prohibit the liquor traffic, the introduction of liquor into the Indian country, and even

the establishment of a prohibition zone surrounding the Indian reservations, even within the limits of a sovereign State, or under the power of Congress to regulate commerce with the Indian tribes, which is directly delegated to it in the same article as that which delegates its power to regulate commerce among the several States.

So I think we have our case proved as to the power of Congress to prohibit commerce in intoxicating liquors.

Senator BORAH. Justice Harlan said in a case in which the majority of the court agreed that the power of the National Government over interstate commerce was the same as the power of the State government over interstate commerce.

Mr. DINWIDDIE. Yes, sir.

Senator BORAH. If that is true, and the State can prohibit the importation of intoxicating liquors in the State, why has not the National Government the right to prohibit here in the United States?

Mr. DINWIDDIE. I would say that was still further confirmation of our proposition. That is so, in my judgment.

Now, I have simply this further word. Mr. S. B. Horton is here representing the Seventh-day Adventists, and he desires to file some statements here to go in as a part of this record. He has indicated what he desires to have printed, and I would like to have that privilege extended him.

Senator NELSON. If there is no objection, that may be done.

The statement is as follows:

STATEMENT OF MR. S. B. HORTON.

As representing the Seventh-day Adventists' principles of temperance, I favor this and all similar legislation.

That the saloon is a most prolific source of crime no one can deny. To do so, one must close his eyes to a multitude of facts of everyday occurrence and deny to reason all logical deduction. He must deny the relation between cause and effect and say that a mad man is as safe as a sane one. He must rule out the record of our police courts and brand the testimony of experienced judges and distinguished jurists as false and untrustworthy. Only last November Judge Kimball, of the Federal branch of the police court of the District of Columbia, said:

Many years of close observation as judge of the police court has convinced me that the largest percentage of crime is directly traceable to drinking. I was at the jail recently, and I asked Warden Harris for his opinion on this same subject, and he asserted that his talks with criminals of all types had shown 90 per cent of them had reached their downfall because of whisky drinking. This is not far from the fact.

Judge Wallace, of the criminal court of Kansas City, Mo., only the other day said:

Intemperance is the greatest single enemy of the human race. That every murder tried so far since I have occupied the criminal bench has been traceable to intoxicants, and that more than 75 per cent of other crimes have been due to the same cause, has put me against the open saloon.

And the Supreme Court of the United States has itself declared that—

The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these liquor saloons than to any other source.

To say, therefore, that it is not proper for the State to suppress a traffic with such a record as this is folly. As well might it be argued that the Government has no right to suppress anarchy, or prohibit arson, or remove a powdermill or a pesthouse from a city or town.

In justification for its continued existence, it is urged that this traffic furnishes the Government no small amount of revenue, and the query is raised as to what would become of the country if this source of revenue were cut off. Thus the Philadelphia Liquor Dealers' Association has sent out the following statement:

If it were not for the revenues that the saloons of this country are now paying the Government, heaven only knows what would become of the taxpayer. The millions of dollars we pour annually into the National and State treasuries help to lower the tax rates and virtually support the communities. To eliminate the saloon would be to undermine the foundations of the country's revenues.

To this the Philadelphia North American, of November 14, 1907, replied as follows:

The statement is at once an insolence and an untruth. The sanctuaries of this Nation are not built upon pillars made of kegs and barrels. Something besides bottles stands between America and bankruptcy.

There are two sides to every question. The liquor interests must have their day in the court of public opinion. But if this is to be the basis of the structure of their defense, they are building upon a foundation of sand sure to be swept away by the rising tide.

It is true that the revenues from the liquor traffic are large. It is true that taxation of their commodities and their trade provides a considerable percentage of the cost of maintaining many a county.

But they are taxed not for profit, but to strike an approximately even balance sheet. For against the income thus provided are debited the deaths, the crimes, the disease, and the loss of earning power of thousands that are directly traceable to drunkenness throughout the country. A look on both sides of the ledger is necessary before an account is closed. In every spot on earth income from the liquor traffic is merely part payment in recompense of the greater annual cost charged against the community.

When Gladstone, upon a certain occasion was confronted with this question of the large revenue received by the Government from the liquor traffic, he said: "Give me a sober England, and I will take care of the revenue."

Dr. T. A. MacNicholl, in the Journal of the American Medical Association, the largest and most widely distributed medical journal in America, says: "From 53 per cent to 77 per cent of the descendants of drinking parents are dullards, while from 4 to 10 per cent of abstainers are dullards." While we legislate against the immigration of undesirables, shall we treat with indifference the cause of a greater number of less desirable citizens?

In every public room, on street corners, and in public conveyances, we see warning against a practice which is liable to spread the dreaded disease tuberculosis. We make local and general provisions for the care of consumptive patients, while at the same time remaining indifferent to one of the most prolific causes of the disease. Dr. T. J. Mays, writing in the Journal of the American Medical Association, says: "The prominence of alcohol as a factor in producing pulmonary consumption is certain. It may be taken for granted that alcoholism and consumption are allied to each other as cause and effect. Consumption predominates from two to four times as much in moderate drinkers, three to six times as much in free drinkers, and three to fifteen times as much in excessive drinkers, compared with abstainers."

We are constantly endeavoring to stay the hand of the grim reaper, Death, and to increase the length of human life. C. Fernet, in an article entitled "Mortality and Alcohol," in the Bulletin de l'Academie de Medicine, Paris, says: "It would help the campaign against alcoholism if the deaths due to it were listed separately in the vital statistics. There are from 150 to 200 in every 1,000 (15 per cent to 20 per cent) deaths for which alcoholism is directly or indirectly responsible." This shows that one out of six dies from alcoholism, and it is estimated that one out of seven dies of tuberculosis. Which is the worst and against which should we direct the stronger efforts?

Many claim that the arguments of prohibitionists consist largely of sentiment. I will, therefore, produce authority, Mr. Chairman, that I am certain your honorable committee will not regard as sentiment. It is from the United States Supreme Court, *Crowley v. Christensen* (137 U. S., 86):

The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these liquor saloons than to any other source.

It is undoubtedly true that it is the right of every citizen of the United States to pursue any law, trade, or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. * * * There is no inherent right in a citizen thus to sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States.

We can not shut out of view the fact within the knowledge of all that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks. (*State of Kansas v. Ziehold and Hahelin*, 123 U. S., Rep. 623-662.)

It appears from these clear, plain, unanswerable, judicial statements that there remains no further question as to the duty of Congress with reference to the sale of liquors in the District of Columbia or in any other place within the limits of our Government.

Again, it is claimed that should prohibition prevail it would be a great loss financially to the Government. In reply to this argument I will herewith quote the decision of the United States Supreme Court on this point:

If a loss of revenue should accrue to the United States (because of prohibition) from a diminished consumption of ardent spirits, she will be a gainer a thousandfold in the health, wealth, and happiness of the people. (*License cases*, 5 How., 46 U. S., 573-632.)

STATEMENT OF MR. R. E. L. HARRIS, OF AUGUSTA, GA.

Mr. HARRIS. Mr. Chairman and gentlemen of the committee, I do not desire to make a speech, but simply to go on record in this matter. I am here from Georgia, and simply want to say that we are all in favor of this proposed legislation. Dr. Du Bose has spoken for us and so ably and completely that I do not think it is necessary to add anything, but I simply want to go on record and say that I wish every Georgian here had had the opportunity and time to speak, because I know they would all have something interesting to say.

In conclusion, we plead with you to give us the protection that we need for our homes and for our families. I thank you.

Senator NELSON. Senator Kenyon, do you wish to be heard?

Senator KENYON. No, Mr. Chairman. I would, however, like to make a couple of suggestions. I hope to make my speech on this

bill on the floor of the Senate some day. The friends of this measure I think would like the opportunity to file a brief with the committee. The legal questions, of course, are somewhat difficult.

Senator NELSON. We should be very glad to have a brief filed, especially on the constitutionality of the law that is proposed.

Senator KENYON. That is the first suggestion I have to make. The second is that some time be granted for a hearing to those who are opposed to this measure. I do not see how anyone could seriously oppose it, but still I think we ought to give an opportunity for those people who may be against it to present their arguments. Some time ought to be fixed, and within reasonable limits, it seems to me, for such a further hearing.

Senator NELSON. Of course we will have to give the other side a hearing, but we will endeavor to expedite it as much as possible.

Senator RAYNER. I came in late, and therefore am not fully informed as to what scope the hearing has covered. Has there been an argument on the legal questions?

Senator NELSON. Yes; and it has all been reported stenographically.

Senator RAYNER. Very well; I will have an opportunity of reading it, then.

Mr. DINWIDDIE. As a concluding word I want to say that while we have emphasized here the Kenyon bill, an explanation is due and is fair in that connection. When this bill was brought to our attention last year, Mr. Webb, of North Carolina, introduced it in the House, and Senator McCumber almost simultaneously introduced it in the Senate. There is a very slight difference between the Kenyon bill and the McCumber bill of last year. I want the people here to understand that Senator McCumber has been sponsor for this bill and has been for it for a long while; and that Senator Kenyon put it in after a conference in which some 39 States were represented. Besides official delegations from many of the States appointed by the governors, there were 26 national organizations represented in that conference in Washington in December, solely on the interstate-commerce proposition.

I did not feel like asking Senator McCumber to speak now because he had indicated that he would take that opportunity later, but I want you to know that the only difference is in the second section, which was added to the McCumber bill in the Kenyon bill, and the addition of the word "received" in the first section, and a slight modification of the title.

VIEWS OF MISS PHOEBE W. COUSINS.

The following letter was filed:

WASHINGTON, D. C., *January 30, 1912.*

HON. CLARENCE D. CLARK,

Chairman Judiciary Committee,

United States Senate, Washington, D. C.

MY DEAR MR. CLARK: Convalescing from a serious illness, I have not been able to attend the various hearings before your committee on the Kenyon bill, and the various discussions of the temperance question, as has been my wont in days past. I therefore respectfully request that you will present my views to your committee, at any

time when it may seem advisable, and incorporate them as a part of the discussion.

Permit me to say I am most emphatically in favor of the bill. First, because it is in harmony with all the traditions of this Republic, that each and every State shall conduct its own autonomy in respect to the majority vote; and second, that outside interference in matters in which the voters of each or any State have expressed their ipse dixit as to their governmental direction is an act not only of impertinence but an unlawful performance which can not bear the scrutiny of legal review.

If this were a question of principle violated, or of a citizen deprived of an inherent right, the State could be inhibited against each and all; but when simmered down to the whys and wherefores it is simply a demand of the liquor interests for protection by Congress, of forcing their wares into a State which has declined to receive them, regarding them as obnoxious to morals, detrimental to the public health, and objectionable to the majority of its voters. Surely the lawmakers of this Republic have no constitutional prerogative to fuse their implied powers into a despotic act which virtually deprives a prohibition State of all its independence from outside powers, and takes from it the indisputable right to test its own experiments by sincerity of purpose.

I therefore beg that my name be added to those who desire the passage of the Kenyon bill, and to be recorded as a citizen of this Republic who believes that a "dry" territory has the right of protection from a "wet" inundation when the said "dry" territory has become so by the will of the people while the "wet" is merely a purveyor of goods seeking a cash outlet for its wares already labeled "inhibited" by the supreme voice of the lawmaker. The one is absolutely legal, the other is a violation of the will of the State.

Submitting my views as a part of your hearings, and asking that they be incorporated in the published proceedings, I am, with high respect,

Yours, very sincerely,

PHOEBE W. COUZINS.

The bill introduced by Senator Curtis is as follows:

[S. 1523, Sixty-second Congress, first session.]

IN THE SENATE OF THE UNITED STATES.

APRIL 20, 1911.—Mr. Curtis introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL To constitute intoxicating liquors a special class of commodities and to regulate the interstate-commerce shipments of such liquors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all fermented, distilled, or other intoxicating liquors shall constitute a special class of commodities, and, as a special class, shall be admitted to and carried in interstate commerce, subject to the limitations and restrictions hereinafter imposed upon interstate commerce in articles of such special class.

SEC. 2. That the interstate-commerce character of all fermented, distilled, or other intoxicating liquors admitted to interstate commerce in accordance with the provisions of this act and transported from one State, Territory, or District of the United States into any other State, Territory, or District of the United States, or from

any foreign country into any State, Territory, or District of the United States, shall terminate upon their arrival immediately within the boundary of the State, Territory, or District of the United States in which the place of destination is situated and before the delivery of said liquors to the consignee: *Provided*, That shipments of such liquors entirely through a State, Territory, or District of the United States shall not be subject to the provisions of this section while in transit through such State, Territory, or District of the United States.

The bill introduced by Senator McCumber is as follows:

[S. 2310, Sixty-second Congress, first session.]

IN THE SENATE OF THE UNITED STATES.

MAY 15, 1911.—Mr. McCumber introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL To divest intoxicating liquors of their interstate-commerce character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, including beer, ale, or wine, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be possessed or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited; and any and all contracts pertaining to such transactions are hereby declared to be null and void, and no suit or action shall be maintained in any court of the United States upon any such contract or contracts, or for the enforcement or protection of any alleged right based upon or growing out of such contract or contracts, or for the protection in any manner whatsoever of such prohibited transactions.

The bill introduced by Senator Culberson is as follows:

[S. 3710, Sixty-second Congress, second session.]

IN THE SENATE OF THE UNITED STATES.

DECEMBER 12, 1911.—Mr. Culberson introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL To regulate interstate commerce in spirituous, vinous, malt, and other intoxicating liquors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever any spirituous, vinous, malt, or intoxicating liquors of any kind shall, by being transported from one State into another State or Territory or the District of Columbia or from a foreign country into any State or Territory or the District of Columbia, become a part of interstate or foreign commerce, said liquors are for all the purposes of this act hereby constituted a special class in such commerce subject to the regulatory powers of the Congress until their arrival at the place of consignment within the borders of any State, Territory, or the District of Columbia and delivery to the consignee: *Provided*, That nothing in this act or in any other law shall be held to prevent the subjection of said liquors in original packages or otherwise to the reserved police powers of any State after arrival within the borders thereof and after reaching the place of consignment and before delivery to the consignee: *Provided further*, That nothing in this act shall authorize any interruption of or interference with, by any State or its authority, the transportation of such merchandise from without such State to the place of consignment within such State: *And provided further*, That it shall be unlawful for any railroad company,

express company, or other common carrier to deliver or offer to deliver to any person any of such liquors at any other point than the point of consignment, or to unnecessarily and unduly arrest the transportation of such liquors at any other point than the point of consignment, with the intent either directly or indirectly to violate the provisions of this act.

SEC. 2. That whenever any spirituous, vinous, malt, or intoxicating liquors of any kind shall be or become a part of foreign or inter-state commerce it shall be unlawful for any railroad company, express company, or other carrier, or any officer, employee, or agent thereof, engaged in or in connection with the transportation of such liquors of any kind from one State into another State, or from any foreign country into any State or Territory or the District of Columbia, to collect, either directly or indirectly, on or before or after delivery from the consignor or consignee, or from any other person, the purchase price or any part thereof of such liquors; and it shall be unlawful for any railroad company, express company, or other carrier, officer, employee, or agent thereof, in any manner, directly or indirectly, to act as the agent of the consignor or consignee, or of the buyer or seller of such liquors, for the purpose in any manner or degree of buying or selling the same, saving only in the actual transportation and delivery of the same and to the extent as provided in this act.

SEC. 3. That it shall be unlawful for any railroad company, express company, or other carrier, officer, employee, or agent thereof, to accept for transportation, or to transport from any State into any other State or Territory or the District of Columbia, or from any foreign country into any State, Territory, or the District of Columbia, spirituous, vinous, malt, or intoxicating liquors consigned to any fictitious person or to any fictitious name, or without consignment to some person, or after having so accepted or transported any such liquors consigned to any fictitious person or fictitious name, or without consignment to any person, to deliver the same to any person whomsoever.

SEC. 4. That every railroad company, express company, or other carrier as aforesaid, or any officer, employee, or agent thereof who shall knowingly violate the provisions of this act, or any part thereof, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars: *Provided*, That any officer, employee, or agent of such company or carrier who shall be convicted as aforesaid shall, in addition to the fine herein provided for, be liable, in the discretion of the court, to imprisonment for a term of not less than one month nor more than one year.

SEC. 5. That nothing in this act shall be construed to authorize a State to control or otherwise interrupt or interfere with the transportation of liquors intended for shipment entirely through such State and not intended for delivery therein.

SEC. 6. That every package containing any spirituous, vinous, malt, or intoxicating liquors of any kind intended and designed for shipment from one State or Territory to a point in another State or Territory or the District of Columbia shall, before delivery to a common carrier for transportation as aforesaid, be plainly and distinctly marked with the names of the consignor and consignee, the names of the point of shipment and the point of consignment, and with the name of the liquor contained therein and the quantity thereof, and every consignor delivering any package of such liquor or liquors to a common carrier, as aforesaid, unless the same be plainly and distinctly marked, as aforesaid, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars. Every package of such liquors intended and designed for shipment from any foreign country into any State or Territory of the United States or the District of Columbia shall be similarly marked, and every package of such liquors not marked as provided in this section shall, upon arrival within the United States, be seized and confiscated.

SEC. 7. That all laws and parts of laws in conflict with this act are hereby repealed.

Senator NELSON. The hearing stands adjourned for the present and the subcommittee will notify those interested of the selection of a date for a further hearing on the bill.

The subcommittee then adjourned to Saturday, February 17, 1912, at 11 a. m.

**HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON
THE JUDICIARY, UNITED STATES SENATE, SIXTY-SECOND
CONGRESS, SECOND SESSION, ON BILLS RELATING TO
INTERSTATE SHIPMENTS OF INTOXICATING
LIQUORS INTO "DRY" TERRITORY**

PARTS 2, 3, AND 4

INTERSTATE SHIPMENTS OF INTOXICATING LIQUORS INTO "DRY" TERRITORY.

SATURDAY, FEBRUARY 17, 1912.

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,
Washington, D. C.

The subcommittee met at 10.30 o'clock a. m.

Present: Senators Nelson (chairman), Dillingham, Borah, and Bacon.

Senator NELSON. At the last meeting we gave the entire session to those who were in favor of the proposed legislation. We will now, at this meeting, in the first instance, give those who are opposed to the legislation a hearing, and Mr. Bartholdt will please take charge and present those whom he wishes to be heard in opposition to the proposed legislation.

STATEMENT OF HON. RICHARD BARTHOLDT, REPRESENTATIVE IN CONGRESS FROM THE TENTH DISTRICT OF MISSOURI.

Representative BARTHOLDT. Mr. Chairman and gentlemen, you were kind enough to invite me to appear here this morning, and I am ready to proceed with an argument against the pending bills along constitutional lines; but I notice that there are present about 100 or 150 ladies, among whom are some who wish to be heard by the committee, and these ladies have come from a distance, and as I can be heard at almost any time, I should prefer to yield to the ladies. I do not suppose they will speak on the constitutional side of the question, but will probably address their remarks to the policy of this legislation, and that question can not well be separated from the constitutional question, because every one of those bills which has been introduced is intended to prop up by national law the cause of prohibition. Therefore the question of prohibition is involved. In other words, no one can vote for any of these bills without going on record in favor of the principle of prohibition, and on that phase of the question these ladies would like to address you.

Very much has been said by the other side about the American mother being interested in this question. The opponents of this legislation, by popular demonstration, would like to satisfy and convince the committee that there are American mothers on the other side of the question, and that they are mothers who, as a rule, are attending to their own home duties. They do not regard it as their mission in life to be out upon the platform and the stump and participate in street processions, but they attend as best they can to their sacred duties as mothers and wives at home; but this occasion has been deemed important enough by them to come out and demonstrate

that many American mothers are not in favor of this kind of legislation.

Mr. Chairman and gentleman, I take pleasure in introducing Mr. Adolph Timm, the secretary of the National German-American Alliance, who, with your permission, will proceed to introduce the speakers.

**STATEMENT OF MR. ADOLPH TIMM, SECRETARY OF THE
NATIONAL GERMAN-AMERICAN ALLIANCE.**

Mr. TIMM. Mr. Chairman and gentlemen, I have corresponded with the Hon. Knute Nelson, the chairman of this committee, and I beg to express the thanks of the German-American Alliance for extending this hearing.

I regret to say that our president, Dr. Hexamer, of Philadelphia, is unable to be here this morning; and also that the chairman of our law committee, Mr. Sutro, finds it impossible to be here.

We have some 30 speakers on our list. Among them we hoped to have the Rev. Dr. Blum, of Philadelphia, but just before coming here he called me up on the phone and said he would not be able to come here to-day. Therefore I beg to ask that you will give us another hearing in about two weeks, as there are several speakers who are unable to be present to-day whom we would very much like you to hear.

Senator NELSON. Go on with your hearing to-day and then we will dispose of the other matter later.

Mr. TIMM. On behalf of the German-American Alliance of the State of Texas, composed of more than 10,000 members, I wish to present their protest against the proposed legislation. I will not take time to read all of this, but I desire to present this protest from Texas and make it a part of the record.

The protest referred to is as follows:

The COMMITTEE ON THE JUDICIARY,

United States Senate, Washington, D. C.

GENTLEMEN: On behalf of the German-American Alliance of the State of Texas, composed of more than 10,000 members, we, the undersigned president and secretary, take this means of most emphatically protesting against the passage of a bill through Congress which provides for a strict State regulation of all liquor traffic with the respective States, and to place the same beyond the reach of the Interstate Commerce Commission. The transportation of all articles of commerce passing from one State to another has heretofore been wisely placed under the regulation and protection of the Interstate Commerce Commission, and now to take any part of this traffic out of the hands and place it beyond the control of that body is, in our opinion, unconstitutional and contrary to the sound principle of our Government. It is such a discrimination in the shipment of certain articles of commerce from one State to another that it will trample under foot the constitutional rights of a great part of the citizenship of our Republic, and it is a long step toward destroying the foundation on which our Government rests.

We therefore respectfully submit to the honorable Committee on the Judiciary our protest to the passage of that bill, because we sincerely believe that the welfare of our country demands it.

Witness our hands at San Antonio, Tex., this 8th day of February, 1912.

HUGO MOELLER, *President.*
J. WINDLINGER, *Secretary.*

Mr. TIMM. Mr. Chairman and gentlemen of the committee, at a previous hearing the Rev. Johannes Schubert, of Wilkes-Barre, Pa.,

pleaded against the interstate liquor bills because he claimed that these bills would also prohibit the importation of wine for sacramental purposes. At this hearing Mr. Dinwiddie said that this was not the case. We wrote to Georgia as to the terms of the provisions of the Georgia prohibition act with reference to wine for sacramental purposes. We are advised that a recent decision of the Appellate Court of Georgia holds that the act has no bearing on this subject, as it was never intended to interfere with the freedom of any man to worship God according to the dictates of his own conscience. If a decision of the appellate court was necessary, there must have been some kind of trouble. The National German-American Alliance is going to look up the proceedings of this case, and therefore I beg leave to ask for more time.

To-day I want to say this: If the pending interstate liquor bills are not supposed to interfere with the importation of communion wine, why is this not mentioned in the bills? I read that the National Druggists' Association have entered a protest against the bills. Why do not these bills contain clauses that they are not to interfere with sacramental, medical, and private use of intoxicating liquors? Because the prohibition devil hides between the lines of these bills.

Senator NELSON. Do you represent any church or religious organization.

Mr. TIMM. I do not.

Senator NELSON. I should think they would naturally be the parties, if any there be, who would be worried over any question in reference to sacramental wine.

Mr. TIMM. Mr. Chairman, if you will pardon me, I am acting for the Rev. Johannes Schubert, who took this matter up with people in Georgia, and who was unable to be here this morning. Mr. Schubert would be glad to go into that matter more fully. I am simply speaking for him.

I now wish to introduce Mrs. E. J. Dornhoefer, of New York, secretary of the Ladies' Auxiliary of the National German-American Alliance, who will speak for them.

STATEMENT OF MRS. E. J. DORNHOEFER, OF NEW YORK, CHAIRMAN OF THE LADIES' AUXILIARIES OF THE NATIONAL GERMAN-AMERICAN ALLIANCE.

Mrs. DORNHOEFER. Mr. Chairman and gentlemen of the committee, as chairman of the Ladies' Auxiliaries of the National German-American Alliance, and in the name of the 50,000 women in the United States whom I represent in that capacity, I herewith protest most earnestly against the bills pending before your honorable committee, because these bills are in aid of prohibition; because we German-American women are convinced that measures of this kind only lead to excess in drinking in secret, instead of to true temperance. I am not a lawyer or an orator—only a wife and mother who has the welfare of her family and of her people very much at heart. I am of German birth, but as loyal an American as any woman in the land. I desire to express my innermost thoughts before your honorable committee, honestly and openly, about this question, which is of much importance to us all.

I wish it to be distinctly understood that I am not speaking against temperance. To be temperate is, according to my ideas, the only road to health and happiness in life. But temperance and prohibition, the issue before you in this bill, are as far apart as the day and the night, and quite as different. So much has been said about the curse of indulgence in stimulants and the misery which it brings to wives and mothers that I consider it my duty as the representative of thousands and thousands of wives and mothers throughout our beautiful land to answer this question.

I am aware that there is no greater evil or more heartrending sorrow for a loving wife than to see her husband intoxicated; no greater agony for a devoted mother than to see her boy losing his manhood in drink; but, gentlemen, do you believe that the passage of such bills, even if its effect would be the closing of every saloon in the United States, would prevent these excesses? I say "no," and a thousand times "no." It will have the contrary effect. Our husbands and sons, if morally weak, will seek and find places convenient for the indulgence of this vice. Forbidden fruit tastes doubly sweet. It takes other means to stop intemperance. We, the wives and mothers of respectable, hard-working husbands and sons, have too much confidence in the moral stamina of our beloved ones to desire the passage of bills which will curtail their personal liberty, cast a slur on their manhood, a doubt on their will power, and question their judgment. Our Lord Jesus indulged in wine and did not consider it a sin, nor did He preach against the use of it. I can not understand how any true and loyal wife can advocate a measure which is against the holiest right and privilege of man, namely, the exercise of his free will, so long as he injures no one.

I beg of you, gentlemen, do not recommend the passage of these bills. Do not, I implore you, rob our great and glorious land of one of its best features—freedom. Give our men a chance to prove what they can do of their own free will, not by force of law, because only the free man is a good and loyal citizen; the degraded never can be that.

We Germans can never be accused of being the cause of drunken brawls in low resorts and dives. That much the most fanatic prohibitionist will concede. We are as much opposed to such places as are the best in the land; we abhor and despise them. What we desire are places where we can spend a few hours with our family and friends, and where it is no crime to enjoy what our means can afford. Why do people wish to deny us this privilege when countless little shops are permitted to sell poisonous sweets to our babies and vile cigarettes to our boys, Sundays as well as on any other day? As to the betterment of conditions, I know by my own personal observations that the closing of clean, law-abiding saloons makes matters worse instead of better.

Before I close I wish to say that I pride myself on being a true Christian woman and representing 50,000 true Christian women, and that we all despise drunkenness and disorderly conduct with all our heart and soul, but we honestly are convinced that a man has as much right to drink an occasional glass of wine or beer as we have to drink a cup of tea or coffee, and that he ought to be able to do so without thereby breaking the law. Our husbands and our sons are loyal American citizens, and though we are all proud of

our German origin, we love our adopted country and are as truly loyal to our glorious Stars and Stripes as we were to our dear German flag.

I appeal to you, gentlemen, as an anxious wife and mother who knows fully her responsibility and who fears that the passage of these bills will reduce the manhood of husbands and sons, in that by command of law they will be forced to break the law in order to secure those natural rights which our Creator has bestowed upon every human being, and which it is beyond the function of the Government to invade.

Mr. TIMM. I now wish to introduce Mrs. Henrietta Grunebaum, of New York City.

STATEMENT OF MRS. HENRIETTA GRUNEBaum, OF NEW YORK CITY.

Mrs. GRUNEBaum. Mr. Chairman and gentlemen of the committee, in the name of thousands of American women of German birth or descent of the city of New York, I plead against any law to prohibit the importation of liquor into certain States. Such laws would be a wrongful attack upon our households. Laws are made to be obeyed. The law in question would be one to be disobeyed. It will rob a man of a good friend—a glass of beer or wine after a hard day's work, to be enjoyed in his own home at his own table amidst his own family—and would force him to get what he honestly and sincerely believes to be his right in spite of the law. Consider the danger. For if he can not have his glass of beer or wine at his own table, because he can not buy it in his own town or State, or buy it in any other State, to be sent to his home, he can easily smuggle in a bottle of most concentrated ardent spirits—a comparatively small quantity of which may serve as a poison for a whole family.

As a representative of the members who constitute the local branch of the women of the German-American Alliance of the City of New York, I am delegated to enter our most earnest protest against the passage of the interstate liquor bills pending before this committee, because we believe that they would be an aid to prohibition, and as such we are convinced they would be an obstacle to true temperance.

Mr. TIMM. I beg to introduce Mrs. Margaret Kermes, of New York City, representing the auxiliaries of the State of New York.

STATEMENT OF MRS. MARGARET KERMES, OF NEW YORK CITY.

Mrs. KERMES. Mr. Chairman and gentlemen of the committee, in behalf of the German-American women's societies of the State of New York, I protest against any interference with the interstate liquor traffic by Congress. Why is only liquor mentioned in the bills before you? It is a well-known fact that a large number of patent medicines are sold all over the country which contain even more alcohol than liquor does and are largely used in place of intoxicating drinks by families in prohibition States. Such drugs are infinitely more harmful in every respect than beer and light wines. Drinking of beer and wine is supposed by our prohibition friends to create in some people an injurious habit; but so will co-

caine and morphine and so-called liver pills. Coffee and tea par-taken in excess are poisonous. Should the traffic in coffee and tea be prohibited? Because a small percentage of men and women can not control their habits, must we all suffer?

Mr. TIMM. I now introduce Mrs. Marie Werneth, of Philadelphia, representing the auxiliaries of that city.

STATEMENT OF MRS. MARIE WERNETH, OF PHILADELPHIA.

Mrs. WERNETH. Mr. Chairman and gentlemen of the committee, in behalf of thousands of German-American women of Philadelphia, I beg to plead against all interstate liquor bills before you. A man who has been working hard all day, no matter what his profession or trade, finds recreation by meeting his friends and congenial company after working hours. A woman who has been drudging all day in her household and with her children has also a right to such recreation. It is decidedly illogical to drive men and women into separate clubs to find entertainment. It lies in the interest of mothers and wives to share the diversions of men. The experience of centuries has proved that wherever families jointly frequent public places, where they meet good company and where light drinks are served and good music is rendered, the moral qualities have been highest and the greatest happiness has prevailed. A man should not go where his wife can not go with him. The presence of the wife refines the ways of men. For where such a custom has not prevailed men have taken to indulging in strong liquors; and, not being restrained from excesses by the presence of pure women, easily fall a prey to other vices.

Mr. TIMM. I beg to introduce Mrs. Matilde Herzog, of Philadelphia, representing the German-American women's societies of the State of Pennsylvania.

STATEMENT OF MRS. MATILDE HERZOG, OF PHILADELPHIA, PA.

Mrs. HERZOG. Mr. Chairman and gentlemen of the committee, in behalf of the German-American women's societies of Pennsylvania, composed of thousands of wives and mothers, I most emphatically protest against interfering with the interstate liquor traffic. I do not speak against temperance but against prohibition. That beer and light wines, even if taken regularly by women, are conducive to their general health is proved by the physique of the average German-American woman and her ability to do her duty to the family as well as to the State. Prohibiting all this by not allowing the importation of beer and wine into our homes will assuredly lead to the habit of imbibing strong liquors and will create vices which lower the condition of not only the family but also of the Nation. We come here, not because we court notoriety, on the contrary, but to show you that the prohibitionists in petticoats do not represent all the women of our Nation. Therefore, in the name of all women who gave to the Union the best they could give, their sons whom they taught to battle for Old Glory even unto death; their daughters whom they taught to build up happy homes and to send forth sons and daughters that are a credit to our Nation--in the name of these American women I do protest against any assault on the freedom of the individual and our happy home.

Mr. TIMM. I beg to introduce Miss Carrie Fischer, of Baltimore, representing the ladies' auxiliaries of Baltimore and Maryland.

STATEMENT OF MISS CARRIE FISCHER, OF BALTIMORE, MD.

Miss FISCHER. Mr. Chairman and gentlemen of the committee, we have appeared before you to protest against all interstate liquor bills, and while we shall not take up your valuable time with lengthy speeches, nor care to discuss the legal side of the question, yet we should like you to understand that we are indeed in earnest with our protest, foreseeing the consequences of the proposed act and realizing our duty to step forward into the public arena, which as a rule German-American women are not wont to do.

We are here as citizens of this great Republic, as the wives of our husbands, as the mothers of our sons, as sisters of our brothers, as defenders of happy and peaceful homes. The great majority of us were born in this country, daughters of parents who came here to enjoy that promised, sacred liberty and freedom which their idealism dreamed of meeting on these shores.

Yet again and again the foes of that liberty seek to destroy the most intrinsic personal rights of the individual. Not satisfied with having in some districts abolished the public sale of alcoholic beverages, they now intend to enter the homes and try to get control of goods shipped to private persons. As to the public sale of liquors, we do not defend the American saloon, for it is not our creation, nor do we ignore its dangers, but we maintain that it is a thousand times better than the rum shops and dens which would shoot up out of the ground everywhere if the members of the household could not in a legal way obtain what they want; and we further maintain that the hypocrisy and cowardice which satisfies its wishes with adulterated and poisoned substitutes is a most horrible stain on this country of the free and the brave.

Finally, we no less emphatically pronounce it a state of anarchy if hired spies are allowed to enter any house and confiscate or destroy the goods, no matter what they are, therein.

Do our adversaries realize that an endless war will follow the measure they advocate? That war, of all against all, will necessarily be the outcome?

We American women of German descent see but one great task before us—the education of our children. We rather raise them in such a way that they are strong enough to overcome temptation, and we entertain the greatest fear that the generation which would rise under a law like the one proposed will be the more weak and rotten as it grows up under the dreadful curse of the temptation of a forbidden thing. We are hoping for a race that enjoys a joyful life amidst the toil of this busy age, and we know that the state of things which our adversaries advocate will create a Nation of a small circle of earnest people on one hand, while the far greater majority will be hypocrites and lawbreakers.

Gentlemen of the committee, in behalf of the American home, we women ask you to manfully oppose this bill, which strikes at the root of its inviolableness and sacredness.

Mr. TIMM. This closes our list of speakers, but Mrs. Dornhoefer wishes to make a few additional remarks.

Senator NELSON. We are here to hear anybody in opposition to the bill.

Mrs. DORNHOEFER. As all the ladies could not get into the room, they asked me to come out and assist them to hold an overflow meeting in the hall, and I ask that my secretary may be allowed to read the resolution which has been adopted.

Mrs. Grunebaum read the resolution referred to, as follows:

An overflow meeting of American women of German birth and descent, held in the corridor of the rooms of the Committee on the Judiciary of the Senate, respectfully asks the honorable committee not to pass any interstate liquor bills.

This is signed by E. J. Dornhoefer, chairman, and H. Grunebaum, secretary.

Mrs. DORNHOEFER. We beg to thank you, Mr. Chairman and gentlemen of the committee.

Mr. TIMM. We have a hearing before the House Committee, and, with your leave, we will now withdraw.

Senator NELSON. If there are others who wish to be heard in opposition to this legislation we will give them an opportunity to be heard at this time.

Mr. TIMM. May I ask if Mr. Hahn, of Astoria, Oreg., is in the room? We had hoped that he would be here and address the meeting.

There was no response; but Mr. Hahn addressed the committee later.

Senator NELSON. We will hear any others that want to be heard in opposition to this legislation. If there is no one who wants to be heard in opposition, we will then hear any who are in favor of it. We might as well use the time that we have this morning.

Representative BARTHOLDT. Would it be possible for the committee to give another hearing to those opposed to the pending proposed legislation?

Senator NELSON. Oh, yes; but we want to utilize the time at our disposal this morning, and if there are any parties who want to be heard in favor of this legislation we will give them a hearing to-day.

Senator BACON. We will hear those opposed or those in favor of it.

STATEMENT OF MR. A. L. FANKHANEL.

Mr. FANKHANEL. Mr. Chairman and gentlemen, I simply want to say that I represent the Independent Citizens' Union of Maryland, which is an organization with over 7,500 members. We are representing the largest German-American organization in Maryland. In fact, the organization comprises 92 different societies, mostly of Baltimore City and Baltimore County.

As the Independent Citizens' Union is a State branch of the German-American Alliance, that is the reason I take the pleasure to come and escort these ladies. We would like to have a hearing, which you will perhaps grant us later on; but since you have asked if anyone here wants to make any remarks, I thought I would take advantage of your kind offer.

I want to say that our organization is not interested in either distilling or brewery interests. Our members are among the best citi-

zens of the community in which they live. We have among our members preachers and physicians, and bankers and merchants, and manufacturers, and a great many working men. They are all of the opinion that this question pending is one they are interested in, notwithstanding they are not in the distilling business or the brewery business.

The Independent Citizens' Union wishes to protest emphatically against the passage of any such laws as are proposed. It believes that to pass such laws would be contrary to the personal liberties and privileges which we as citizens ought to be allowed to enjoy. Besides, we feel that legislation of this kind will not really stop drinking. A man who wants a drink is going to get it, and if such laws are passed he will be more apt to drink in an underhanded and undesirable way and an inferior liquor or beverage, whatever he wants to drink. We feel that it will lead to violation of the law and to the drinking of strong and poisonous liquors rather than light wines and beers. I do not think that a man who is accustomed to drinking a glass of beer is in any way hurt by it. I believe that it is a wholesome and proper drink in moderation, and especially if a man enjoys it in the company of his family. I do not wish to be understood as defending the saloon business by any means. This legislation, however, is calculated to keep away from a man's home what he may desire and what he is properly entitled to, in the way of beer or wine.

Our German-American citizens are known to be temperate. They do not furnish many hard drinkers. As one of the ladies has said, a good many of us believe that it is proper to educate our children in the matter of drinking to be moderate in their desires, and in that way I think we can all reach the desired result. But this proposed legislation will simply lead men to get liquor in a secret and unlawful way, and will bring about conditions that may be a thousand times worse than what they are now.

I thank you.

Mr. TIMM. We wish to thank you, Mr. Chairman, for the hearing, and beg to be excused.

At this point the delegation from the German-American Alliance withdrew.

Senator NELSON. Are there any here who desire to be heard in favor of this proposed legislation?

Representative BARTHOLDT. I was going to continue, but now I will not have time to finish. I would need a couple of hours.

Senator NELSON. I may say if there are any others who wish to be heard this morning, we will hear them.

STATEMENT OF REV. E. C. DINWIDDIE.

Mr. DINWIDDIE. I do not want to take any time, but I am sorry that some of our friends who have spoken on the other side have left, for I should like to refer to several things in their presence.

Senator NELSON. Why did you not ask them to remain?

Mr. DINWIDDIE. I presume a request of that kind from me would not weigh very heavily with them, especially when they have an engagement on the other side of the Capitol.

I will take just a few minutes, with your permission, Mr. Chairman. I am satisfied that the major part of our friends, who have been worked up into a sort of frenzy in opposition to the bill, either have not read the bill at all, which is altogether likely, or they have not read it intelligently.

I know that the committee will bear me out when I make the statement that the bill is not directed against the things which these people have referred to this morning. The bill does not even go as far as the legislation, which we formerly sought to have enacted, proposed to go. It is simply and solely directed against the single proposition that liquors can be imported in the channels of interstate commerce for the purpose of violating local and State law; that is all. The question of personal use of intoxicating liquors has no business to be lugged in here at all; it is not in this proposition.

Representative BARTHOLDT. May I ask you a question?

Mr. DINWIDDIE. Certainly.

Representative BARTHOLDT. If a prohibition law is properly enforced, which means that the manufacture and sale of liquor are prohibited entirely in a certain State, and Congress comes to the aid of these prohibition States by legislation of this kind, preventing the importation of liquor into such a prohibition State, does my friend think that it will be possible legally for any man in such a prohibition State to secure a glass of wine for his table?

Mr. DINWIDDIE. I certainly do, unless the State in which the man lives enacts legislation absolutely prohibiting the use or possession of intoxicating liquors.

Representative BARTHOLDT. But if the State prohibits the sale and manufacture both—

Mr. DINWIDDIE. They do that now—

Representative BARTHOLDT. Allow me. And if that State law is rigidly enforced (and we are here to suppose that laws are passed for the purpose of being enforced), then, in addition to that, if you prohibit the importation from the outside of any beers or wines into that State, how will a man be able to legally and lawfully secure a glass of wine for his table?

Mr. DINWIDDIE. These bills for which we are pleading do not prohibit the introduction of liquors into a State from outside, absolutely not. They provide against the introduction of intoxicating liquors into a State if the intention is to violate the laws of the State.

Senator DILLINGHAM. Against whom is this bill directed, the shipper or the transportation company?

Mr. DINWIDDIE. Really neither. As I explained the other day, when I think the Senator from Vermont was not present, it is really directed to the point that the State may get jurisdiction of these liquors by proceedings in rem under a search and seizure process, for the purpose of determining whether the liquors have been imported or are about to be imported for a lawful purpose or for an unlawful purpose, and to assist the State officers in discharging their duties in carrying out the laws of the State. There is no way to do that now, and they are met with Federal injunctions estopping them from discharging their duties under the State law.

Senator DILLINGHAM. Outside of the question of the original packages, are they met with that difficulty?

Mr. DINWIDDIE. Yes; they meet with that difficulty, but not outside of the question of interstate-commerce shipments. I will give a concrete case. To-day it is not possible for the processes of a State to be carried out without running contrary to a Federal injunction by a district or circuit judge. It is not competent for them to operate the processes of their State courts to find out whether liquors shipped from one State to another are being imported for lawful or unlawful purposes. They may be shipped in violation of the food and drugs act, they may be shipped in violation of sections 239, 240, and 241 of the penal code, which you passed three years ago, and the State can not operate its search and seizure laws to determine judicially—not by any means such as confiscating the liquors (as these people seem to think we want to do)—but we can not even determine by a lawful judicial proceeding under a valid State law, whether the liquors are brought in for lawful or unlawful purposes.

Senator DILLINGHAM. Wherein is the difficulty?

Mr. DINWIDDIE. The difficulty is that these liquor men go to the Federal courts and get a restraining order against the State officers on the ground that the Congress has not spoken so that they can judicially seize the liquors, when suspected, and determine this question of whether the liquors are for lawful purposes or unlawful purposes.

Senator DILLINGHAM. I can understand that may be so up to the time that the liquor goes into distribution, but after that, where can there be any interference?

Mr. DINWIDDIE. Well, you understand, Senator, that the most effective weapon that the State has anywhere—and while it is drastic legislation, it has been uniformly sustained over the country—is the search and seizure process. Our States have found that they must employ the search and seizure laws to reach these violators of liquor laws, and the difficulty is that these liquors get into the hands of “bootleggers” and “blind-tiger” men and “speak-easy” men, as they are called, and then the State’s problem is immeasurably increased and made more difficult, and it is next to impossible to prove violations of the State law by these bootleggers and blind tigers, whereas if this legislation were enacted, liquor that is brought in for unlawful purposes could be proceeded against and the violation of the law prevented by keeping these illegal cellar and garret and back alley liquor sellers from receiving their supplies through the channels of interstate commerce, when, as a matter of fact, they can not get their stock inside the State.

Senator DILLINGHAM. Wherein does the present law, which provides that all packages of liquor shall be branded so that the State authorities shall know what is inside the package, fail to give the State all the rights under its police powers that the State needs?

Mr. DINWIDDIE. Well, Senator, that has not failed to accomplish the purpose for which it was enacted, but I can not see that a purely branding proposition, which I think that is—section 238 or 240, that you adopted about three years ago—goes any further than simply putting the police officers of the State on notice—

Senator DILLINGHAM. You understand I am not antagonizing you. I am asking these questions for information.

Mr. DINWIDDIE. And I am receiving them in that way.

Senator DILLINGHAM. You concede that the Federal Government has no police power over the people in the State?

Mr. DINWIDDIE. Yes.

Senator DILLINGHAM. The Federal Government goes so far as to give notice to everybody when liquor goes into a State by causing it to be branded, so that the State, if it wishes to test the question of whether that liquor is there legally or illegally, may, in the exercise of its police powers, institute proceedings to ascertain that fact?

Mr. DINWIDDIE. Yes.

Senator DILLINGHAM. Now, then, wherein does that fail to give the State all the right and authority that seems to be necessary to enforce its laws?

Mr. DINWIDDIE. I am very glad you asked the question, because that enables me to bring out exactly the point involved. That, as I said, puts the State on notice that John Jones, of Smithville, is about to receive a package of intoxicating liquors, such and such kind of liquor, and in such an amount. Now, if John Jones is a law-abiding citizen and is importing those liquors for his own personal use, and if the law of the State does not inhibit the citizens of that State from using or possessing intoxicating liquors, there is no intention of getting hold of those liquors and libeling them or confiscating them. That is the point I would like to have our German-American friends understand, and I think they will understand it, and the country at large will understand it, before we get through with it.

Senator DILLINGHAM. Is there any State which prohibits the use of liquors in one's family?

Mr. DINWIDDIE. I do not know of any such State. I think I may say that I know there is none. There is no State in the Union to-day that attempts to do it, and, therefore, in the absence of that legislation, this talk about interfering with personal rights of a man or a family to import intoxicating liquors for their own personal use is not apropos. But I will get back to a specific answer to the question of the Senator, because I think that is exactly the thing we want to know about.

Senator DILLINGHAM. That is what I would like you to speak of.

Mr. DINWIDDIE. In that connection let me say—and I say this in answer to the statements made by the opposition to this legislation—that over against what they say with reference to the personal use of intoxicating liquors, much of which we could deny and disprove if we chose to do it—but I consider it beside the question, it is not in place to bring that in here until the States begin legislating against the personal use and possession of intoxicating liquors, and then, in my judgment, that has no business before the Congress of the United States, because it is a matter absolutely of State control, and I think it ought to rest there. If the State does go finally to the extreme limit, which no State goes to now, of attempting to interdict the possession and use of intoxicating liquors, it is my judgment that the State ought to have the right to do it and that the Congress of the United States ought to permit it to exercise its police powers in that way.

Senator BACON. You are mistaken about that, surely. Congress does not permit any State to exercise police powers.

Mr. DINWIDDIE. Yes; that statement was carelessly worded.

Senator BACON. The police powers can not be interfered with by the Federal Government.

Mr. DINWIDDIE. Exactly. I am glad you called attention to that mistake on my part, because that is fundamental. What I meant to say was that Congress should not interfere by silence or in any other way from letting the States exercise their police powers and which they ought to exercise without any interference from outside.

Representative BARTHOLDT. May I interrupt?

Mr. DINWIDDIE. Do you wish to ask me a question?

Representative BARTHOLDT. Yes.

Mr. DINWIDDIE. Very well.

Representative BARTHOLDT. The point made by Mr. Dinwiddie just now is the one which I should like to emphasize, because it proves conclusively that this legislation goes further than any prohibition State has gone. No prohibition State has prohibited the use and consumption—

Mr. DINWIDDIE. That proves my case, then.

Representative BARTHOLDT. But the effect of this legislation will be to prevent the use and consumption absolutely.

Mr. DINWIDDIE. Have you read the bill?

Representative BARTHOLDT. I have. What does it mean? It means to prohibit the importation of liquor into a State.

Senator BORAH. Provided the State prohibits it.

Representative BARTHOLDT. Certainly.

Mr. DINWIDDIE. But that does not affect the importation, because a State can not prohibit the importation.

Representative BARTHOLDT. I am very much interested in the effect this legislation will have, because there is a great deal of beer manufactured in St. Louis.

Mr. DINWIDDIE. We are aware of that interest.

Representative BARTHOLDT. It would be a cyclone, worse than any cyclone nature could send us, if this legislation should pass. It would entail the loss of tens of millions of dollars to an established, lawful industry of my district.

Mr. DINWIDDIE. The passage of this bill?

Representative BARTHOLDT. Yes, sir. It simply means that when liquor shipped from my city or anywhere else to a prohibition State reaches the border line the State authorities will have the right to seize that liquor, because it comes in violation of the State law, and consequently your point that that liquor could be secured for private tables is not well taken.

Mr. DINWIDDIE. You certainly have not read the bill. I am not going to get away from Senator Dillingham's question, because I want to answer it. But I want to say right there that if Dr. Bartholdt is right, that the passage of this bill for which we are asking will lose tens of millions of dollars for his constituents out there, those constituents are engaged in doing tens of millions of dollars of business the purpose of which is the violation of the laws of the sovereign States of this country.

Representative BARTHOLDT. Not at all, Mr. Chairman.

Mr. DINWIDDIE. I will leave that with the committee.

Representative BARTHOLDT. I will not permit such a reflection to rest upon my constituents. I will say this: That every citizen in a

prohibition State under the laws of this country and under the Constitution has a right to order an interstate shipment, and the Constitution says, and every decision of the Supreme Court is to the effect, that that right to receive an interstate shipment, no matter whether I live in a prohibition State or not, is not a right based upon a law passed by Congress but upon the Constitution. It is a constitutional right to receive an interstate shipment. Consequently my constituents do not do an unlawful business in sending to a man who orders from them whatever he requires.

MR. DINWIDDIE. Now, I will say to the doctor, for his information, along the line of the point that the court has said that that is a constitutional right—and he and I will not have any argument about that—that it is a constitutional right for a man in one State to have shipped to him alcoholic liquors from another State. It is his right to receive those liquors. The Wilson law simply has the effect of preventing his selling them in unbroken packages if the law of his State forbids it. But that constitutional right that Dr. Bartholdt speaks of is the same constitutional right the Supreme Court held in the Bowman case and the *Leisey v. Hardin* case—was the right not only to receive in the original unbroken package but the right to sell in the original unbroken package, the State law to the contrary notwithstanding. They used the same language then, saying it was a constitutional right. Congress took away by direct legislation the constitutional right the man had to sell liquor in the original package, if he received it through the channels of interstate or foreign commerce. That is a correct statement, which I am ready to rest upon before any committee of lawyers or anybody else.

Representative BARTHOLDT. Not at all. That was not a constitutional right at all—

MR. DINWIDDIE. The Supreme Court said so.

Representative BARTHOLDT. Under the decision of the Supreme Court it was decided to be a constitutional right to receive an interstate shipment. In other words, an interstate shipment is not delivered until it is delivered to the hands of the consignee. But the very moment it leaves the hands of the consignee the State law goes into effect, and that is why I have always argued that this legislation is unnecessary, for the reason that as soon as a consignee receives a shipment of liquor and tries to dispose of it by sale or otherwise the State law is in effect, and you can prevent him from doing it without any law enacted by Congress.

MR. DINWIDDIE. I am free to say that if the constituents of the doctor and those who buy their products for sale were men who would absolutely obey the laws of their States, we would probably not need this legislation; but the keepers of blind tigers and speak-easies all over the country, at whom exclusively this legislation is aimed, do not always respect the law—and I rest on the language of the bills for this statement. I say that a plain, careful reading of that bill can not give anybody the impression that we are trying to prevent by congressional legislation the importation or use of intoxicating liquors for family or personal use.

I want to get back to the question asked by Senator Dillingham, which is really the cause of our asking additional legislation.

Of course, you are all familiar with the circumstances surrounding the passage of the penal code several years ago. I know from sev-

eral conversations I had at the time—and I happen to be one who took the view several years ago when these penal-code amendments were pending—that while I did not think they reached the seat of the difficulty, I thought we ought to take them, give them a fair test, and make them go as far as they could, and if they did not reach the case that we would be able to come to Congress and reply to just such a question as the Senator so pertinently and properly asked to show wherein they did not meet the seat of the difficulty.

Now, then, the branding amendment is law, and if they ship legally they must go with the bona fide consignee's name on the outside of the package, and the statement of what kind of liquor is in the package and the quantity of it. Now, if the police officers of the State into which the liquor is sought to be imported are active and alert—and that is a hard thing to find among those officers, because through express companies and whisky houses, and so on, there is necessarily more or less opportunity for petty graft—but if they are careful and alert they ought to be able to discover when liquors are brought in for unlawful purposes, or are about to be brought in unlawfully.

Now, then, they go into court and under the usual process—I do not suppose there is a State in the Union in which it is not done—they have to swear that there is probable cause for believing that such liquors are possessed or kept for the purpose of violating some law of the State. A search warrant is issued out of some court of competent jurisdiction. It is turned over to the proper officer of the court for execution. The officer goes and searches the described premises, whatever they may be—a railroad depot or storage plant, or whatever it may be—and when he finds the liquors described in the warrant he seizes them. Now, in the next place, he does not destroy them. He can not. There is no State law that would be upheld if that sort of thing was done. He seizes them and brings them into court at a time specified in the warrant. For the purpose of what? Of determining judicially, under the valid legislation of the State, whether those liquors are there for lawful or unlawful purposes. Now, then, if there is no law of a State forbidding the possession or use of intoxicating liquors by the individual, notwithstanding all that has been said here, I deny that the State can hold the liquors or libel them or confiscate them. The State has got to show that the liquors are there for an unlawful purpose or the consignee gets his liquors, and if the State has no law upon the statute books forbidding the use of intoxicating liquors for personal or family use the consignee gets his liquors, and if the consignee is not violating any law, or intending to do so, no State would or could hold or destroy the liquors.

Nobody wants to keep him from getting them and nobody ought to have the right to keep him from getting them under such circumstances.

Mr. COOK. If I may interrupt you there—

Mr. DINWIDDIE. It will be an interruption unless it is along this same line.

Senator DILLINGHAM. I would like to hear you finish your statement.

Mr. DINWIDDIE. That is what we call the search and seizure process. It is a proceeding in rem against the liquors. Coming to the

Senator's question again, I am frank to say that this legislation is not aimed at the consignor, who may be ignorant of the intention of the consignee. We are trying to be fair about this proposition. We are not penalizing the carrier, which may not know and naturally will not know what the consignee intends to do with the goods. There is no penal clause in here as to the carrier. What we want to do, however, is to have the opportunity to proceed in this manner against the thing to determine whether the liquors are there to be used in violation of law or not.

Senator DILLINGHAM. Right there, what do you get out of this bill?

Mr. DINWIDDIE. What we get out of this bill is this: If this bill passes and our State authorities proceed under a search and seizure law for the purpose of determining whether the liquor is there lawfully or not, we avoid the interference by the Federal courts by injunction against the processes of the States.

Senator DILLINGHAM. That is what I wanted to be enlightened on. Just how would you avoid that?

Mr. DINWIDDIE. Let me give you a specific case. I am probably more familiar with this case, because I happened to have charge of the fight for the adoption of constitutional prohibition and prohibitory law in Oklahoma after the passage of our enabling act provision by Congress in 1906.

Down there the State officers, beginning with the counsel to the governor, who is an officer charged specifically with the enforcement of the State prohibitory law, down to the constable in the townships, are to-day under injunction from the Federal courts of the eastern and western districts of Oklahoma forbidding them to operate the lawful processes of the Oklahoma courts to determine the very proposition that I have just named to you—whether liquors that are sent in through the instrumentalities of interstate commerce are sent there for lawful or unlawful purposes.

Senator DILLINGHAM. Upon what ground are those injunctions issued and are they temporary injunctions or final?

Mr. DINWIDDIE. They were temporary injunctions, and they have been made final.

Senator DILLINGHAM. Upon what ground?

Mr. DINWIDDIE. Upon the ground that the State can not operate that way until Congress has removed the impediment through its plenary power to regulate interstate commerce and place these articles of interstate commerce in a position where the State laws can operate.

Senator DILLINGHAM. Were those injunctions issued before the goods were delivered to the consignee or afterwards?

Mr. DINWIDDIE. Before, because after they get into the hands of the consignee the State is able to operate under its police powers. But it is very difficult for the State to get hold of any liquors brought in unlawfully, after they get in the hands of the consignees, because they operate in cellars and garrets and at night, and in similar difficult and obscure places. They have bootleggers and speak-easies, as they are called.

Senator DILLINGHAM. What I want is to have you state the legal ground upon which those injunctions were issued.

Mr. DINWIDDIE. They were issued on the ground that the State has no right, under the present laws of Congress, as interpreted by the Supreme Court, to operate its processes upon interstate shipments of intoxicating liquors.

Senator DILLINGHAM. Until they have been delivered.

Mr. DINWIDDIE. Certainly. I say under the decisions of the Supreme Court—especially, I refer to the Rhodes case, under the Wilson law, with which, of course, you are as familiar as I am—the Rhodes case is the case that has given us practically all our trouble, and in that case the court held that the words that Congress used in the Wilson law “upon their arrival within the State” meant “after their delivery to the consignee.”

Senator DILLINGHAM. That they had not arrived until they were delivered to the consignee?

Mr. DINWIDDIE. Yes; that is it.

Senator BACON. I would like to make a suggestion that I would like Dr. Bartholdt to have the benefit of, as he is going to argue this case later. I would like to direct his attention to a certain view of the question. Any regulations made by a State, which did not go to the extent of prohibiting the reception of liquors might be directed to such regulation as would prevent the improper use, or, rather, devices for the violation of the law. For instance, a State might say no man should receive over 10 gallons, stopping the opportunity of men who wanted to get a large quantity for sale. They might say that a man should not receive any more than 10 gallons. Such a regulation might be permitted under this law, and it would not interfere with the personal liberty of the citizen—the reasonable exercise of his right to receive liquor. As an illustration of the thought that was in my mind, when we had a hearing before, those present will remember that a gentleman from my own State made an address, in which he stated that a man who was operating a blind tiger in his community, or just on the outside of the town, where the police officers could not very well reach him, had received immediately before Christmas some six or eight casks of whisky.

Senator NELSON. Half-pint bottles.

Senator BACON. Yes; the whisky was in half-pint bottles, each cask being filled with half-pint bottles. You will see that there was the opportunity given him to import liquors in a way where he could most readily evade the law. It might be possible for a State to pass a law which would prevent that thing being done and at the same time not prevent the reception by a citizen of liquors for a legitimate purpose in a reasonable quantity.

I give that illustration for the purpose of directing your attention to it, because I do not think myself that this particular bill—it may be that some of the other bills do, but the Kenyon bill is the one we have particularly before us—I do not think this interferes with the direct importation for a man's own use of liquors, but it gives the opportunity for such regulation as would defeat the purpose of those who desire to import liquors for illegal purposes. I wanted to suggest that to you in order that you might direct your attention to it.

Representative BARTHOLDT. If you will permit me to make one suggestion in connection with that?

Senator BACON. Certainly.

Representative BARTHOLDT. Whatever the form may be, whenever it provides that liquors shall be seized or can be seized before delivery, that provision makes the bill unconstitutional.

Senator BACON. Well, that is a question, of course.

Representative BARTHOLDT. There is no question in my mind about that.

Senator BACON. That is a question. We had an elaborate argument on that several years ago.

Senator NELSON. When you come to discuss the constitutional question, I would like to hear something on that subject. In the State of Georgia, as I understand it, you have prohibition.

Senator BACON. Not prohibition of the use or the reception of liquor, but prohibition against the sale.

Senator NELSON. Yes; prohibition against the sale of liquors. That is the law of your State?

Senator BACON. Yes, sir.

Senator NELSON. And your State has the full police power. Now, why should a citizen of Florida have a greater right in the State of Georgia to violate the laws of that State than a citizen of Georgia? That is a question I would like to hear discussed.

Mr. DINWIDDIE. I would be very glad to let the other side discuss that question.

Senator NELSON. It seems to me that is at the root of the matter. It is more a question of men than of things.

Representative BARTHOLDT. But, of course, that is not for this Congress to determine—

Senator NELSON. North Dakota has a similar law to Georgia. Why should a citizen of the State of Minnesota have a greater right in respect to that subject in North Dakota than one of her own citizens?

Senator BORAH. Not only as a moral question, but as a legal proposition, has he any greater right?

Senator NELSON. As a constitutional proposition. I simply suggest that for future discussion. I do not ask you to discuss that now, but I simply want to hear that point discussed before we get through with it.

Representative BARTHOLDT. I should like, before Rev. Dinwiddie completes his argument, to call attention to something that may throw some light on this whole procedure here. In the last Congress, as you gentlemen will remember, we passed a penal code.

Senator NELSON. The Congress before the last, I think.

Mr. DINWIDDIE. Yes, sir; almost the last day of March, 1909.

Representative BARTHOLDT. And that penal code contains the so-called C. O. D. provisions to which Mr. Dinwiddie refers.

Mr. DINWIDDIE. And the branding amendment to which Senator Dillingham referred.

Representative BARTHOLDT. Yes. I remember at that time the opponents of legislation of that kind in the House were in the position to defeat the penal code because of the attempt to attach these very provisions to the code. We came to an agreement, those of us who were opposed to this legislation and those who were in favor of it. The agreement was this: That we, on our side, should consent to that legislation being enacted at that time, to give it a fair chance,

to determine what the results of this legislation would be, as to whether the evils of which Rev. Dinwiddie and others complain would be cured by that legislation. Both sides, as I understand—I do not know whether you were a party to that agreement——

Mr. DINWIDDIE. I certainly was not.

Representative BARTHOLDT. But your representatives on the floor of the House were——

Mr. DINWIDDIE. Who were they?

Representative BARTHOLDT. Well, if the committee insist on mentioning names, I shall mention them.

Mr. DINWIDDIE. I should be very glad if any such agreement was made if you would mention names. I can tell you some who were not parties to it.

Representative BARTHOLDT. I was a party to it. We were in daily consultation about it. We did not want that great code to fail because of that difference of opinion, and we came to the conclusion which I have stated. I finally consented to it. We could have beaten that legislation in the House, but I consented to let it go on the bill for the purpose of testing the effect of it. The agreement was that for some years to come there would be no attempt made to pass any further legislation—until we had a full and fair understanding of what the effects of these C. O. D. provisions would be. And therefore, gentlemen, I hold—and those of my colleagues of the House who were with me in that fight hold—that the attempt here on the part of these gentlemen and ladies to force the hands of Congress in securing further legislation on that question at this time is really a violation of a sacred compact entered into at that time.

Mr. DINWIDDIE. I think I can answer that in a few words. In the first place, if it were absolutely correct that there were such an agreement, I do not see how that would bind the Senate. The Senate could do as it pleased, and pass the thing over to the House, and the House could determine whether it was bound by such an agreement as the one referred to, said to be made in a Congress three years ago. On the other hand, I want to state most emphatically that I was not a party to such an arrangement, representing a certain contingent of the temperance forces. Mrs. Ellis is here, and she represented the Women's Christian Temperance Union, and I do not think she was a party to that.

Mrs. ELLIS. No.

Mr. DINWIDDIE. I can say that some of my leading friends in the House—I do not think that it is improper to say this in view of the fact that the question has been raised, and not raised in the first instance by me—three or four of our leading friends over there took those amendments and urged them, not as finalities, for we did not believe they would be, but because we felt that was all we could get at the time, and as practical people we thought we would take what we could get and test it, and if it did not go far enough we would come and ask for additional legislation.

But if it were all true, we still think we have met the difficulties Dr. Bartholdt has referred to. We have tested it and we are up against Federal injunctions when it comes to operating the valid processes of the State courts on this question whenever interstate shipments are involved.

Now, let me say this—and I would like to make this an additional suggestion in answer to Senator Dillingham's question. I do not think the States would be justified in pressing this thing as far as they do if it were not for the fact that they have done everything they can do—and they have respected Federal law—the very State of Oklahoma to which I have referred has respected Federal law, their State courts have held absolutely and strictly to the interpretation of the United States Supreme Court with reference to interstate-commerce shipments under the *Rhodes v. Iowa* decision. They have held that a man importing liquors for personal use, there being no State law against the use of intoxicating liquors, can not be interfered with, and the intoxicating liquors must be delivered to the consignee. They are not trying to overreach Federal law. They are trying to operate within the bounds of Federal legislation as construed by the Supreme Court. But they want the chance, legitimately, as we believe they are entitled to it, to ascertain whether those liquors are being received by a man whose intention is to violate the law of the State. They want the right to prevent crime against State law instead of being limited by congressional inaction to punishing for its actual commission.

Senator DILLINGHAM. Will you give me a reference to the cases where those injunctions have been upheld?

Mr. DINWIDDIE. The injunctions have been upheld—

Senator DILLINGHAM. I would like to read the opinions.

Mr. DINWIDDIE. I would like to give you the citations. They were cases 13 and 14 originally in the United States Supreme Court, where writs of prohibition which the State of Oklahoma, as an extraordinary measure, asked the Supreme Court to issue against the Federal judges compelling them to desist from issuing these restraining orders. You understand the State of Oklahoma was not a party to these original suits, could not get into the case on appeal, and the Supreme Court held that under their power the writ of prohibition being a discretionary right, they could grant it or not; and when they did grant it they granted it along well-defined lines, and they said the question might have been raised and come up regularly on appeal; but in that case the State was not a party, it was simply a case of certain liquor men against men who were officers of the law, and so the application for the writ was denied.

Senator BORAH. When the court made the injunction permanent did it render an opinion?

Mr. DINWIDDIE. It did.

Senator BORAH. The court below?

Mr. DINWIDDIE. The court below. That is, the decree of the court. Then they were cited, of course, to appear when the application for the writ of prohibition was filed.

Senator DILLINGHAM. What Senator Borah and I would like would be a chance to read what the courts have said. Can you give us the cases?

Mr. COOKE. Two hundred and twentieth United States, 191, is the first case, ex parte Oklahoma. The second case is ex parte Oklahoma, page 210. Then the case of the State of Oklahoma v. California, Colorado, and Santa Fe, page 290 of the same volume.

Mr. DINWIDDIE. That last case involves Indian treaties and is not the case or the proposition I referred to. The cases I referred to

are 9 and 10 of the original October, 1910, term, just cited by Mr. Cooke.

Mr. DINWIDDIE. The court did not decide the cases on the merits at all.

Mr. COOKE. It was on the technical question of the operation of the writ of prohibition.

Senator DILLINGHAM. Were the opinions delivered in the court below?

Mr. DINWIDDIE. My recollection is that they were. You can get it out of the Supreme Court records, I suppose.

Senator BACON. It is not yet printed in volume form.

Mr. DINWIDDIE. It is bound in the permanent records of the Supreme Court.

Senator NELSON. Those decisions of the lower Federal court would be published in the Federal Reporter?

Mr. DINWIDDIE. Yes, sir.

With your consent, Mr. Caldwell, who represented the State of Oklahoma in these cases and who really drafted this bill, will be here soon, and I should be glad to have him heard, if it does not postpone action too long.

Just a word before Dr. Bartholdt goes. It is always a good thing to get back to the actual language of a proposition. This bill says that the shipment of such liquors from said State or Territory into another State or Territory, which said liquor "is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or district of the United States" * * * "is hereby prohibited."

If there is no law to be violated, if the liquors are there for lawful purposes—unless the consignee intends to violate the law of his State they are there for lawful purposes if the State has not inhibited their use or possession—this bill does not give the State possession of those liquors. And, further, it says, "enacted in the exercise of the police powers of such State, Territory, or District of the United States." That means that if a State attempts to destroy these so-called inalienable rights that our estimable friends on the other side are talking about, that legislation will not be upheld by the courts, because laws of that kind are not enacted in pursuance of the police powers of the State. An unconstitutional law is not enacted under the police powers of a Commonwealth. This only proposes that intoxicating liquors shall be denied the protection of interstate commerce if two things are true; first, that the liquors are shipped or imported for unlawful purposes; and, second, if the legislation of the State which the State proposes to operate on these liquors is a lawful enactment of the State under its police powers.

Representative BARTHOLDT. Of course, in every one of the prohibition States there is a minority, sometimes large, sometimes small, but there is always a minority of people who are opposed to this kind of legislation. I hold that the question of the right to drink beer or wine or whatever you please should never be subject to a majority rule, should never be subject to a vote. I hold that as an American citizen I should not be deprived by a majority of votes of what I regard as an inalienable right.

Senator NELSON. Do you mean the right to sell liquor?

Representative BARTHOLDT. The right to consume and to use liquor.

Senator NELSON. But how about the right to sell liquor?

Representative BARTHOLDT. Well, if there is a minority—I am coming to that question—if there is a large or small minority in the State who desire to use liquor there will be those who will wish to sell it. That is commerce, that is business. If there is a demand for a thing, there will be those who will want to supply it. That is legitimate, perfectly legitimate.

Mr. DINWIDDIE. May I ask you a question?

Representative BARTHOLDT. In one minute.

Senator NELSON. Let him finish his answer first.

Representative BARTHOLDT. Therefore, if you say that liquor is imported into a State for an unlawful purpose, I should like to know what that unlawful purpose is. If it is for the purpose of consuming or drinking it or using it. Now, whether that purpose is an unlawful purpose or not, I do not know. Maybe the wisdom of this committee may determine it.

Senator BACON. I want you to answer the question the chairman asked you. I understand that you are leading up to it, and from your reasoning now your conclusion would be that a majority in a State would not have a right to prohibit the sale of liquor in a State if a minority opposed it.

Representative BARTHOLDT. Well, I say that as a fundamental proposition. Of course, it has been held differently. The Supreme Court says that it is within the police power of the State, but I believe some day some Supreme Court will decide that that is a violation of the inalienable, inherent rights of an American citizen.

Senator BACON. It may be, when we get the recall of the judges.

Representative BARTHOLDT. I hope we will never get that.

Senator BORAH. We would have to start out and have to change our whole system of government a little, would we not, if the minority should control the majority?

Representative BARTHOLDT. What I was trying to get at was this: That that minority which is not in favor of prohibition, which does not want to be deprived of the right of drinking a glass of beer or wine when they want to, which is the position I am in, for I like to take a drink when I want to, although I am a gentleman——

Senator NELSON. The committee would not think of cutting you off.

Representative BARTHOLDT. I am used to taking a glass of wine with my meals, and I want everyone in the world to know it, and it does not injure me to any great extent, it has not impaired me physically or my intellectual faculties, so far as I can see, and I shall probably keep that up until I die. But supposing I lived in a prohibition State, and supposing I belonged to that minority which by vote of the majority is deprived of the possibility of securing that wine for my table, what then?

Senator NELSON. One answer would be that you ought not to move to such a State.

Representative BARTHOLDT. Would you not come to the conclusion that there would be an impairment of the principle of personal liberty which is guaranteed by the spirit of our institutions somewhere?

Senator NELSON. Everybody would have to go to Missouri.

Representative BARTHOLDT. We had this question up in Missouri, the State-wide prohibition question, and the result was that prohibition was voted down by 216,000 majority.

Mr. DINWIDDIE. You are not in any danger, then, Doctor, in Missouri.

Representative BARTHOLDT. The most encouraging and refreshing features of that fight were that even the rural districts of Missouri, the districts outside the great cities of St. Louis and Kansas City and St. Joseph, cast a majority of over 100,000 against prohibition.

Mrs. STEVENS. May I ask a question?

Representative BARTHOLDT. Certainly.

Mrs. STEVENS. I would like the privilege of sending a message to the ladies whom Mr. Bartholdt introduced this morning, which might make them feel a little happier. One of them was troubled at the thought of the home being invaded and searched and the liquor, wine, or beer which they might have there being seized, making a great deal of trouble. I am a woman's woman, and I do not want them to be too much worried, as they evidently were, without cause on that point—on that point and several others. My home has been in the State of Maine—always has been—where we have a prohibitory law, and the search and seizure process is very much in vogue there, and it is applied to the "blind tigers," and oftentimes with difficulty, because they hide away the liquor which is consigned to them, and it is with difficulty that it is found sometimes, whereas if it could be seized when it reaches its destination before delivery to the consignee the search and seizure there would be much less complicated. But so far as the home is concerned, Mr. Bartholdt, thousands of search and seizure processes have been carried on in Maine, and I have never yet known a home to be invaded by the search and seizure process.

Representative BARTHOLDT. Will you permit me a question?

Mrs. STEVENS. I will if I can.

Representative BARTHOLDT. How will you secure that liquor for your own if your State law is properly enforced?

Mrs. STEVENS. Secure it? They have very great opportunities of securing it. The State is flooded with circulars from the liquor dealers outside the State, and if a man in the State wishes to order some of this liquor he knows where to order it. It is very seldom that such liquor is seized or that there is any trouble about it. I think I have never known of an instance where liquor consigned to any respectable man or to any man that was not known to be a liquor seller or blind tiger keeper was seized.

Representative BARTHOLDT. I am comforted to know that there are people in Maine who desire it.

Mrs. STEVENS. There are some. They are not all total abstainers there, but I think all of them will be total abstainers before all of the people will want it.

Senator BACON. A good deal depends upon the point of view from which a thing is looked at. I want to say that I have heard these ladies of German descent, and I can very well appreciate their feelings, and if the world were like Germany, or even like the German residents of this country, possibly the prohibitionists would not take the same active interest in the question that they do.

Representative BARTHOLDT. Why can not we solve it in the same way?

Senator BACON. I was going on to say that conditions make circumstances very different. They have not the whiskey-drinking evil in Europe. I have been in Germany many times and in other foreign countries, and I never saw a drunken person in Germany and very few in France and very few anywhere in Europe, except in England, where the whisky-drinking habit obtains. I want to suggest that those differences in conditions make the difference in views and the necessity for laws which otherwise would not exist. If we could have the same conditions in this country that they have in Europe—I am not speaking of my personal views at all—I do not think that the same interest would be taken in the question of the control of the sale of liquor.

Representative BARTHOLDT. I agree with you.

Senator BACON. But I do not think it is possible in a country where whisky drinking obtains, and I draw that conclusion from the marked contrast there is between the Continent of Europe and England and Scotland. I have seen more drinking in Scotland than anywhere else.

Senator NELSON. I saw in London what I have not seen in this country, and that is women standing up alongside of men in front of the bar calling for their gin.

Senator BACON. On the Continent of Europe, as one of the ladies said, a man goes in with his family and drinks beer or light wine, very much the same as people in this country go into an ice-cream saloon, but you can not, apparently, have that condition of affairs in this country, so far as family drinking places are concerned.

Representative BARTHOLDT. In this connection, Senator, I would like to call the attention of the committee to an important fact, and that is that it seems that all this prohibition legislation that we have had in the past 20 years in the United States has had the effect of increasing the consumption of liquor, of strong drink, and decreasing the consumption of mild drinks. In other words, if you study the internal-revenue figures you will find that in spite of this great agitation against the use of liquor the consumption of whisky has increased much more rapidly than the increase of population—proportionately speaking.

Senator BACON. Judging from observation, I think the use of malt liquors has increased since prohibition has come about in many States.

Representative BARTHOLDT. The increase in the consumption of malt liquors has hardly kept pace with the increase of population. But the consumption of whisky has increased more rapidly than the increase of population would justify.

Mrs. STEVENS. May I ask the honorable gentleman if he thinks that prohibition increases the amount of liquor sold and consumed?

Representative BARTHOLDT. Yes, it does; for this reason: That the milder drinks, like beer, are so bulky that they can not be smuggled, and in prohibition States it will be impossible to secure beer for the reason that the kegs would be seized by the State authorities, but anybody could carry a bottle of whisky in his pocket. It is even being stated in connection with this legislation that the so-called whisky mail order houses are in favor of this legislation.

Mrs. STEVENS. Then I would like to ask why it is that the liquor associations and the brewers and the distillers are opposed to prohibition if it helps their business instead of hurting it.

Representative BARTHOLDT. The brewers are naturally opposed to prohibition legislation because it hurts them. It hurts them more than it hurts the liquor people.

Mr. DINWIDDIE. How about the whisky people?

Representative BARTHOLDT. I can not speak for them.

Mr. COOKE. At the proper time, a representative of the liquor dealers would be glad to make a statement in reference to the alleged violations of the laws of the States which have prohibition.

Senator NELSON. Is it not the liquor dealers that violate the laws?

Mr. COOKE. Not knowingly.

Senator NELSON. Why they ship to saloon keepers in prohibition States, is it not the wholesale liquor dealers who are really the violators of the law?

Mr. COOKE. No; they have no intention of violating the law and they can not be charged with that properly. But the fact that the great complaint exists justifies them in hoping that laws will be framed that will be enforced, and that the sale that actually occurs in the local districts will not be in violation of law. It is said that prohibition in a given district increases the consumption of whisky or other strong spirits.

Senator NELSON. Here is a lady that desires to be heard.

Mrs. LOUISE H. EARLL, of Chevy Chase, Md.: Mr. Chairman and gentlemen, it has been claimed that if a man residing in a prohibition State desired liquor for his home it might be necessary for him to remove to a State that was not a prohibition State. I would like to ask if it would prevent him from obtaining what he wishes to have that package delayed long enough for the State to discover whether or not it was for lawful or unlawful purposes? In our customs service we have to submit to have everything examined before it goes through.

That is my question, would it interfere with a man receiving the package to have it delayed long enough to see whether or not it is for personal use or for unlawful use?

STATEMENT OF MR. CHARLES F. RESSLER, OF BALTIMORE, MD.

Mr. RESSLER. Mr. Chairman and gentlemen of the committee, I am not here for any special interests. I am a plain, humble citizen from Baltimore, and I have been in the hardware business for the last 20 years. I came over with the delegation which you have heard this morning. It has been very interesting to sit here and listen to the different arguments, but it seems to me the main point at issue has really not been brought out very clearly. That is the way it appears to me. Those gentlemen say they do not deny any human being the right to drink liquor. That is correct, is it not [addressing Mr. Dinwiddie]?

Mr. DINWIDDIE. We did not use that language. We said that this proposed legislation does not do it.

Mr. RESSLER. Well, do those gentlemen or does this gentleman deny the right to any human being to drink liquor?

Mr. DINWIDDIE. Shall I answer the question?

Senator NELSON. Just as you see fit.

Mr. DINWIDDIE. Yes; if the question were put up in my State I should deny it thus far: I should vote to prohibit the traffic in alcoholic liquors.

Mr. RESSLER. You deny the right of a human being to drink liquor?

Mr. DINWIDDIE. I say I will vote for a prohibitory law in my State or community which would deny the right of sale of intoxicating liquors.

Mr. RESSLER. In other words, to stop any man from getting it? That is what I want to get at. It is one of the steps or one of the means to prevent any man from getting it.

Mr. DINWIDDIE. I attempted to answer your question; I am not going to have you read into my answer something I did not say. I think I made it clear that I would vote for a prohibitory law. That is entirely a different proposition from saying that I will take all steps necessary to prevent a man from getting liquor for his personal use.

Mr. RESSLER. But those steps lead to the one point, do they not?

Mr. DINWIDDIE. I do not hesitate to admit that the object of prohibitory legislation is to prevent as far as possible the consumption of intoxicating liquors.

Mr. RESSLER. That is what you want; you want to stop any man from having the right to drink.

Mr. DINWIDDIE. Surely; as I just explained.

Mr. RESSLER. I am glad to hear that point. I heard a good deal of argument in Annapolis in regard to this matter. I heard the argument made that the use of alcohol would decay soul and body. The speaker who is now addressing you is a comparatively young looking man, and yet I am a grandfather. I have a grandchild over a year old. I am raising a family of six children, and I have had eight children; five of my children are boys and one is a girl. I challenge any gentleman to show that the use of liquor has decayed my body or soul. I have been using it since my seventeenth year. Of course, I will admit I do not use any whisky. I will say I hate the smell of it. I might sometimes take a glass of it if I were sick. I guess I have not taken two glasses of whisky within the last five years. But I deny any human beings the right—I do not care whether it is a majority or minority—to stop me from taking or using a glass of beer when I desire it.

Senator NELSON. What about whisky?

Mr. RESSLER. It does not concern me. On the other hand, the man who wishes to drink a glass of whisky is entitled to do so. I have never smoked, and yet a man who wishes to smoke ought to have the right to do so and to enjoy his smoke. I have never paid a dollar for a theater ticket, and yet I do not believe in preventing other people from going to the theater. I would let every man live according to his own ideas. So I say if my next door neighbor in the morning drinks a glass of water, and I drink a cup of tea, and another one a cup of coffee, and another one takes one or two glasses of whisky, I have no right, in my opinion, to stop anyone of the three from drinking what they want to. And so I deny them the right to tell me what I shall drink.

Senator NELSON. Suppose your neighbor next door to you takes half a dozen drinks of whisky and gets ugly and jumps onto your stoop and wants to lambaste you?

Mr. RESSLER. We have State laws that would protect us. I want to protest as a plain citizen, as a taxpayer, against any such legislation as is proposed. In my opinion, if this bill is passed it will deprive citizens of their natural, free-born rights to live as they please and drink what they please, so long as they do not interfere with the rights of others, and on those grounds I protest against this legislation.

STATEMENT OF MR. JOHN HAHN.

Mr. HAHN. Mr. Chairman and gentlemen, my residence is Astoria, Oreg. I have no business of any kind, although I used to be in the shoe business in former times.

The German-speaking societies of the State of Oregon, also the Italians and Austrians and those people that live in the State of Oregon that have come out there to make their home, have sent me here to enter their protest and remonstrance against the passage of this pending bill.

They present the following facts: When they were invited to come from the old country they were assured that this flag, the flag of liberty, would wave over them and guarantee them personal liberty; that they could eat and drink just according to the dictates and wishes of their own conscience and the teaching of the Bible. They had studied the Bible; they had seen where Noah was instructed by the Lord how to plant the grapevine and make wine out of it.

Senator NELSON. Well, he did not live in a prohibition State.

Mr. HAHN. No, he did not; and the Lord did not either.

Senator BACON. And he got drunk, too, did he not?

Mr. HAHN. But the Lord did not blame him, because he had to get the experience. They also thought that when the voice of Heaven spoke to St. Peter and told him to eat, it told him that that which entered into the mouth was not to defile the body, but what came out of the mouth from the heart defiled man. The whole Scripture throughout does not say anything against drink in moderation. Scripture says be moderate in all things. We ought to be temperate not only in what we eat and what we drink, but even we are not supposed to work too much.

We have made a garden spot out of Oregon, where there was once a wilderness. We have built up homes there where before there was a waste. We have made a paradise, we may say, out of the wilderness. Now, down in California, they raise and cultivate the grape. They manufacture it into wine. They ought to be allowed, and the citizens of Oregon demand that they shall have, the privilege of making wine and selling that wine to the people in Oregon. As citizens of Oregon, we think and believe that malt liquors, wines, and so forth, are commodities, and when they are taxed and revenue collected by the Government that they acknowledge that it is merchandize, and that if you legislate against it it is class legislation. That is the way we look at it. It would be class legislation.

We believe that our children should be educated in the home to be temperate in the matter of drinking, as well as in all other things.

I was educated to be temperate. I am now 66 years old and I have been drinking beer all my life and am in good health. I do not know that I have ever been a day sick, except when I was hurt in the Army fighting for the United States. I was in the Fourth United States Artillery. I have never been sick in my life. I do not draw a pension. As I have said, I have no business, but I like to be allowed to drink a glass of beer when I want it.

We passed a law in Oregon by a great majority for home rule for the cities, to make their own rules in regard to liquor traffic, and it works well. Our societies admit no saloon keeper, no manufacturer of spirits or liquors into the societies, but we like to have personal liberty. We like to have the privilege of drinking a glass of beer or glass of wine when we desire it. And we accord the same privilege to others. If others want to drink water, they may do so, and if they want to drink beer or whisky or wine or coffee they ought to be allowed to do so.

The temperance people claim that drinking anything intoxicating degenerates our race. I think they are wrong on that subject. A Roman writer, writing over 2,000 years ago, said that the Germans were very fond of their beer, and all the nations that are leaders in the world to-day are users to a greater or less extent of intoxicating liquors. The only country that is a prohibition country is Turkey. Will we be a second Turkey? They have lots of women, but they have not any intoxicating liquors, because it is prohibited by their religion.

Some years ago we passed legislation to the effect that this should be called a Christian country. We ought to live according to the teachings of the Bible. When St. Paul said to Timothy, "Take a drink for your stomach's sake," I think he meant it, and if a man wants to take a glass of beer or glass of wine, I think he ought to have it, and I would advise him to drink it.

Senator NELSON (after consultation with other members of the subcommittee and with other gentlemen present). We will suspend now to meet on Saturday, March 2, at 10.30 a. m.

Thereupon, at 12.30 p. m., the committee adjourned until Saturday, March 2, 1912, at 10.30 o'clock a. m.

INTERSTATE SHIPMENTS OF INTOXICATING LIQUORS INTO "DRY" TERRITORY.

SATURDAY, MARCH 2, 1912.

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,
Washington, D. C.

The subcommittee met at 10.30 o'clock a. m.

Present: Senators Nelson (chairman), Borah, Bacon, and Rayner.

Senator NELSON. There are some gentlemen here this morning from California, representing the wine makers of that State, who desire to be heard in opposition to the proposed legislation. Is there anybody else here who wants to be heard in opposition to these bills? It was the intention of the committee to give those who opposed this legislation the right of way at this meeting, in the first instance. [Continuing after a pause.] We will hear the gentlemen from California, then, first.

STATEMENT OF MR. LOUIS W. JUILLIARD, OF CALIFORNIA.

Mr. JUILLIARD. Mr. Chairman and gentlemen, it may be unnecessary to make any remarks whatsoever to this committee, or at least unnecessary for us to make any extended remarks, to say the least.

Although I understand we have your permission to do so, I do not intend to touch upon the legal phase of this matter. I have heard that there would be men of prominence and ability appear here who would advise you upon that matter, and I believe in hearings of this sort, having had some little experience in these lines, that whatever is said, should be said by people who are fully competent to speak along the lines they cover, and that you should be able to depend upon what they say. In other words, in what we may say to you here we will try to give you the facts that we know about; so when your conclusions are drawn you will have based them upon facts.

We arrived from the West only last evening, sir. We are totally unacquainted with the situation, or almost wholly so, and we can not make a presentation such as we should make. As I said before, however, we will confine ourselves to facts other than the legal phases of the question.

I understand from a hasty reading of the bill that the object of the proposed law is to prevent the transportation, to prohibit the transportation of all liquors, spirituous or malt liquors—

Senator NELSON. Have you read the bill?

Mr. JUILLIARD. Yes. I understand that the object is to prohibit the transportation of spirituous or malt liquors into a dry territory,

as it is so called, or into a territory, more strictly speaking, where the distribution or the use of such liquors is prohibited.

It strikes me that this proposed law—and I simply make the suggestion because I am not going to argue it—is subject to a good deal of constructive doubt, as to what is really meant there. If I ship wines through the State of Nebraska, which State I understand is dry, to the city of New York via or through the State of Nebraska, that is shipping liquor into that State. I refer now to wine. Am I offending, am I coming in contact thereby with the bill?

Senator BORAH. I should not think so.

Mr. JUILLIARD. At first we would not think so. Of course, the word we received on the coast was that the bill read "into or through." If I ship through, possibly I am shipping into that State—in and out of the State. I do not know the effect of this and would ask that you consider that a possibility. So far as I am concerned personally, I would like to submit an authority, if I do find one later, on that subject. But it struck me in reading the bill that there was a doubt there, and while the intent and the purpose of the original contract would not be to break any local law, we might do that even by shipping through a prohibited territory.

I want to say, gentlemen, that we in California—we who manufacture wine and who grow grapes—are not opposed to temperance laws. I participated in the making of some laws that were intended to regulate. I believe in such laws, and if this law that is before you to-day would regulate, I think that the men engaged in the making of spirituous or malt liquors in the United States would not very largely oppose it. This is not intended, however, apparently, to regulate. Now, then, it is history—

Senator NELSON. I think you are laboring under a misapprehension. In the first place, this would not prevent you shipping your wines through Nebraska to New York, even if Nebraska were a dry State. In the next place, shipping your wine to a dry State, you would simply be subjecting that wine to the laws of that State—the same laws that wine produced in that State would be subject to—and that is all.

Mr. JUILLIARD. Yes, sir. Of course, I am assured by the chairman that that is his opinion. But would that be so construed?

Senator NELSON. That is what the bill purports.

Mr. JUILLIARD. I am not quite so sure of that, while I have great respect, of course, for your judgment in the matter.

Senator NELSON. I simply suggest this, and I may be mistaken. You may proceed.

Senator BACON. I will say this to you. Your present purpose is, as I understand, to combat any feature in the bill which will prevent shipment of wines, for instance, from one State into another State. I will say that it is not the understanding of any member of the committee that that is the purpose of the bill, and that the bill will be closely scrutinized and any such possible construction of its provisions carefully guarded against.

Mr. JUILLIARD. That is the point—that we would like to have it so clear that there would be no question upon it.

Senator BACON. Any ambiguity of that sort would be cleared up.

Mr. JUILLIARD. And that leads me to this point, too. The Senator has suggested that the local law would apply to wines or liquors

shipped into a State. If this is meant for a police regulation—I can not help but get on the police phase of it, and you must pardon me for doing so—if this is intended to help out the police powers of the States, why not leave that to the States? If I, a shipper, ship wine knowingly into a dry, prohibition State, the State law is the one which I am breaking; and then if by United States statute it is declared that I have broken a law, it seems to me that is rather strange and peculiar and unnecessary. It is, of course, reaching out under the interstate-commerce act. But does it go any further than the local law goes, or do you try to affect the local law? If I break a local law I am punished under that law. This bill, I understand, has no penalty attached to it other than confiscation or the deprivation of the right to sue in United States courts.

Senator BORAH. The main object of the bill is to do exactly what you want done; that is, to permit the law of the State to operate effectively.

Mr. JUILLIARD. No.

Senator NELSON. That is all there is in this bill.

Mr. JUILLIARD. I am in doubt as to what the effect of the bill is, sir.

Senator BORAH. You seem to be; but the understanding of the committee is that every object you desire to attain is already in the bill—that they are the very objects of the bill. If there is any mistake about it, it is a mistake of language; but the purpose is to do what you say you want done, and that is to permit the State laws to operate.

Mr. JUILLIARD. Not necessarily that, sir. I have not asked you to do anything on the subject whatever, nor have those I represent asked you to do anything; but we are simply suggesting this to you, that if the construction of laws is such, why the necessity of any further action in the premises? It strikes me it would be unnecessary, and I beg your pardon for getting on the legal phase, because I am not prepared to discuss that matter, but it leads me into it all the way along; but I shall go on to the other phase, and say that so far as the business of making wine is concerned—and I mean by that a good table wine, a wholesome product—and so far as the horticultural and agricultural pursuits of growing grapes are concerned, that those are honorable occupations, and they have made a wholesome product which has gone into the homes of thousands of people throughout the United States. They produce light wines, claret, and burgundies, and sauternes, and the like, which go all over the United States. It is a legitimate business, and a business that is based upon the most sacred history. If you will watch the progress of nations, if you will watch the progress of man, you will find that the grape has always followed civilization. You can trace it back to the remotest time. You can trace it from one country to another. In my vineyard to-day I have grapes from Persia. How many have close relations with Persia, or how many have read much about Persia? It simply shows that as man has progressed he has always taken more wine and good wine, not a wine that would be an intoxicant.

I regret very much, Mr. Chairman, that Mr. Sbarboro was not able to be here to-day. He is a man who was born in Italy, but there is no better citizen of America than Mr. Sbarboro. I wanted him to come here to-day to show you that when wines are used properly

they are not harmful, but on the contrary they are beneficial to the human system.

As I have said, the grape has always gone with civilization, and more than that, it has gone with religion. Who brought the grape to the western shores of our country? The padres, the Christian brothers, the Catholic priests, up and down the coast. They brought it to Spain, to the Moors, and there planted on the coast years and centuries ago, the grape from which wine was made. In Biblical times we find references to wine, and while its use has been abused, still that ought not to condemn it, because many things that are useful and good are abused. For instance, money is a great blessing, and yet, as we know, its use is greatly abused.

Senator NELSON. Have you any information as to the proportion of domestic wine consumed in this country, with reference to the whole quantity of wine consumed? I mean what proportion is domestic wine and what proportion is imported from other countries?

Mr. JUILLIARD. The production of wines in California last year was between 40,000,000 and 50,000,000 gallons.

Senator NELSON. Where is that wine principally marketed?

Mr. JUILLIARD. Principally in the United States.

Senator NELSON. In what parts of the United States?

Mr. JUILLIARD. All parts. We make large shipments to Portland, to Seattle, and to the Northwest, and also to New York and to Chicago, New Orleans, and to Baltimore. There is not so very much that comes to Washington and this part of the country. But, generally speaking, it goes to almost every part of the United States. In that connection, Mr. Chairman, let me say that where the population is foreign and they are permitted to use our light wines, or where they use beer, the percentage of drunkenness is very much less than in those parts of the country where stronger intoxicants are used. As Mr. Sbarboro has said, if we used lighter beverages instead of so much strong spirits, the percentage of crime in the United States would be lower than it is. Crime is more prevalent in those countries that use strong intoxicants. For instance you know Russia has her drink—

Senator NELSON. Vodka?

Mr. JUILLIARD. Yes. Mexico has her mescal, Jamaica has her rum.

Senator NELSON. New England used to have the credit in olden times of using New England rum.

Mr. JUILLIARD. Yes, sir. In spite of the laws, different countries and different parts of the country will have their drinks. When the Tennessee regiment came out to California they were held down pretty closely, and they made their liquor right there; they made it in their tents. You can distill liquor from potatoes or rice or anything of that sort. It can be made from corn or barley. I say that the demand of nature is that men should have some sort of alcoholic beverage or stimulant. That being the admitted fact, physicians will admit that, and tell you so, is it not better for us as a Nation and a people to attempt to regulate in a correct manner rather than prohibit? I have asked those who wear the white ribbon, those who come from religious societies, to come forward and help us, rather than cause trouble eventually by insisting on their prohibition laws, which ultimately may result in civil revolution. We have participated in some legislation before and we have taken that stand—we

wine growers—for the reason that we believe that reasonable regulation can be had and should be had.

Senator NELSON. May I interrupt you?

Mr. JUILLIARD. Certainly.

Senator NELSON. I want to ask you or somebody in the room who knows how many dry States there are in the Union?

Mr. JUILLIARD. Eight.

Senator NELSON. Can you give me the names?

Mr. JUILLIARD. I think so. Tennessee, North Dakota, Oklahoma, Kansas, North Carolina, Mississippi, Maine, and Georgia.

Senator NELSON. Why I ask this is for the purpose of following it up with a question. Do you think if you would make your wine in California subject to the laws of these eight States that it would have any material effect on your trade, if you had all the rest of the United States to roam over, and no impediment of any kind, and simply in these eight States you would be made subject to the laws of those States? Do you think that would materially injure your wine trade in California?

Senator BORAH. There might be more than eight prohibition States; that is what he is afraid of.

Mr. JUILLIARD. I was going to answer the chairman's question yes, or yes and no, and then explain. The suggestion made by the Senator from Idaho [Mr. Borah] is the answer that I would make. We have been told when discussing the question of local option that local option was not intended as a prohibition movement, but as a matter of regulation. In fact, they referred to it as an act entitled "An act to regulate the traffic in alcoholic liquors," termed "local option," but in the representations that were made publicly to members it was said that you will learn that prohibition spells prosperity, if you learn to spell it with a local-option primer. That is the danger, sir. If we start right, we will not go wrong.

I believe in what is generally termed progress, progression is all right; but my definition of that is somewhat different—on both sides of the political question. I believe that a progressive is one who steps forward in the right and proper direction, but does not go so far as to have to retrace his steps in whole or in part. That is true progress, I think. And the same way with this committee. If this movement is for temperance, then we have no objection to assisting; but if it is a movement for prohibition, we do object, because the results, even in the future, will not be as expected.

Maine is mentioned first. Now, without any reflection whatever on Maine, we all know that Maine never has been a prohibition State so far as actual workings are concerned. We know that in the fall of the year, when the crops have been gathered, it may be that some activity will be shown by the State officers in the carrying out of the prohibition law and that a number of places where liquor is sold will be closed and perhaps some fines imposed, and it may be that most of the places will be closed during the season of snow and ice, but when the summer visitors come to the State in the spring and summer they will be opened again. So I say that prohibition laws do not prohibit. I think there should be an attempt at regulation and a fair attempt, and something might be accomplished if both sides would join the progressive elements.

The question has been asked, How would it affect California's products, the grape, if this law were passed? Why not let these seven or eight States do as they desire, seek Federal aid, and the like? That is asked. The trouble is, as suggested by the Senator, the increasing example that would be set and the argument that would be used, and probably the further placing of States under very severe prohibition laws. But I do not believe there is a great deal of danger in that, because I believe people are coming to their reason.

In passing, I might say that I voted to give women the ballot in our State. I was not afraid of it, because I believe woman is reasonable and she is analytical in her mind, and when she traces this law to the source I believe she will not vote for prohibition but for fair and proper regulations. I am not criticizing the ladies who come here to-day in the least, those whom we have with us to-day to hear what is being said or to speak themselves. I think they are entitled to full citizenship, as far as that is concerned. Every argument tends that way. But I do not believe that they should all be classed as Prohibitionists.

We have the example of Los Angeles. At her city election on the 5th of December last a prohibition law was voted upon and women did not vote to adopt prohibition. They voted against that law. They believe that there should be regulations. There are regulations of the liquor traffic in Los Angeles, and there are regulations in different parts of the States where saloons are licensed, large license fees being required and strict regulations compelling them to be closed except during certain hours.

I would like to give the committee some figures to show the viticultural industry in the State of California. The investment, sir, amounts to over \$150,000,000. The annual revenue derived from that investment now averages about \$25,000,000. The particular locality, the particular county in which I reside has a revenue of one and a half million dollars a year from that source.

If that is affected, you can see how it would affect a community, say, of 50,000 people, largely viticulturists, the largest grape-growing community in the whole State. It means to them, if their industry is destroyed by adverse legislation, a greater calamity than the earthquake of 1906. It would mean bankruptcy to them. In acreage there are in California nearly 350,000 acres of vines devoted to the table grape, the raisin grape, and to the sweet varieties, and to the wine grape as well.

Senator NELSON. I would like to inquire what the name of that sweet California wine is, which is apparently fortified with spirits and very intoxicating. What is the name of that, if you know?

Mr. JUILLIARD. You probably refer to angelica.

Senator NELSON. I think that is it.

Mr. JUILLIARD. That is a very strong wine.

Senator NELSON. And that is fortified with alcohol?

Mr. JUILLIARD. Yes; that is brandied. Alcohol is used.

Senator NELSON. Most of the wine you make is not that strong?

Mr. JUILLIARD. Oh, no; a 15° wine is a very strong grade. Angelica is much stronger than that. We who drink a good deal drink a very mild wine, and even then a great many take water in it. Drink-

ing our light wines, one can drink a large quantity without being affected at all in the way of intoxication.

Senator NELSON. What is the percentage of alcohol, for instance, in angelica?

Mr. JUILLIARD. That runs probably 30 per cent.

Mr. RODGERS. We are now prohibited by the internal-revenue regulations from fortifying above 24°. You will understand that the percentage of alcohol is 2 per cent of proof. When we talk about drinking whisky at 100 proof, that means 50 per cent alcohol. We have no wines made in California which exceed in absolute alcohol over 23 per cent. We are prohibited by law from making the wine stronger than that.

Senator NELSON. Is there no more than that in the angelica?

Mr. RODGERS. Yes; there is more in the angelica which you get in Minnesota. We ship about a million gallons a year to that State. They are good consumers.

Senator BACON. What is the fact in reference to California sherry? Is that fortified with alcohol or brandy?

Mr. RODGERS. With grape brandy. We make no alcohol in California other than chemically.

Senator BACON. Well, is there any supervision which insures the fact that it is fortified with brandy and not alcohol?

Mr. RODGERS. Yes; absolute Government supervision. There is not a gallon of fortified wine made in California that is not made under the Internal-Revenue Bureau. We have the gaugers and the storekeepers at our plants. They have the Government locks upon all our property.

Senator NELSON. It is immaterial to the Government whether it is fortified with brandy or alcohol, so far as the question of purity is concerned.

Mr. RODGERS. We have no alcohol in the sense that I understand you to use the word.

Senator NELSON. Pure alcohol.

Mr. RODGERS. We only have grape brandy. We have no grains in California other than barley from which alcohol is made.

Senator NELSON. But it can be carried there. It would be cheaper, of course, for them to use alcohol than to use that brandy.

Mr. RODGERS. No, sir; the Government will not permit us to use alcohol. We are only permitted to use the product of the fresh grape, and the product of the fresh grape is, first, must, which is unfermented grape juice and which ladies and gentlemen drink in drug stores; and then when it is fermented it becomes part alcohol, but commercially it is brandy—the material for brandy; and taking a ton of grapes which comes into a winery, one-half of it must go through the still to be made into grape brandy to fortify the must from the other half of the ton.

Senator NELSON. What is the difference in the process in reducing grapes to California brandy and making those grapes, say, claret or any other still wine, such as sauterne? What is the difference in the process?

Mr. RODGERS. The process is exactly the same, only after we have made wine, if we want to make brandy out of it, we send the brandy to a still—a still which has been in use for centuries—and it is heated

to such a degree—the wine now which we call the distilling material, technically—it is heated to such a degree that it rises through the columns of this copper still in vapor, and finally comes out of the top through what is called a gooseneck, it being a long copper pipe, and running into a coil situated in a tub of constantly running cold water. There the vapor is condensed into what is chemically called alcohol, but which is commercially brandy. It is pure. It is nothing in the world but wine concentrated into brandy at an increased proof. For illustration, a ton of grapes will make 160 gallons of wine, and 160 gallons of wine will make 40 gallons of brandy.

Senator NELSON. Thank you.

Mr. JUILLIARD. Dry wine is made in this way: After the crushing of the grapes, the pomace, together with the juice, is taken to a tank, what is termed a fermenting tank, and allowed to remain there, and the sugar causes fermentation. The sugar is changed into brandy or into spirits. It takes about from 8 to 10 days usually. That is dry wine. The sugar has been reduced or taken away or changed into another form, and the wine is then sour, or acid. The acid is contained in the hull of the grape and the tannin in the stem and in the seed, and that is the preservative, or one of them at least, for preserving wine. That is a dry wine or claret. If you desire to make a white wine, white wine is made from the same grape which the padre brought there.

Senator NELSON. What makes the difference in the color—

Mr. JUILLIARD. Both being dry?

Senator NELSON. Yes.

Mr. JUILLIARD. Both being sour, both being dry—the grapes, after having been crushed—if you desire to make white wine, for example, take a mission grape, which is red, draw the juice away immediately, do not let it stand on the hull and the color is yellowish, and that is preserved; that color is preserved. The coloring matter is contained in the hull, and if you leave that and let it ferment, of course the color will change.

Senator NELSON. That is what causes the color?

Mr. RODGERS. The color is in the pulp, the skin.

Mr. JUILLIARD. We have certain varieties of grapes where the color is very high, indeed. For instance, we have the Petit Syrrah, Alicante, Bouchet, etc.

There are engaged in this industry, Mr. Chairman, some 60,000 people. There are upward of 10,000 grape growers in California alone. Now, these growers are not corporations. A great deal has been said about corporations, but they are not corporations; they are farmers; they are the men who are the backbone of the country—farmers, grangers, or, as we call them out there, horticulturists or viticulturists. If you affect their industry it will affect their success and the progress of the Nation. It is not alone they in California who would be affected. As I say, there are many thousands of them elsewhere, commencing with New York and going through Ohio to the Mississippi Valley, and westward, and also southward.

We think their interests should be cared for, and we are satisfied that this committee will think of them and consider them. As I say again, representing as we do the manufacturers of wine and the growers of grapes, we do not desire to impede the passage of a law

that would regulate the use of liquors. I can not conceive in my mind, however, that the Government of the United States could enact a law that would do that. It does seem to me that it must be local law that does that. You have certain laws here that refer to the District of Columbia. You necessarily have them, because you have no local legislature here. The States of New York and Pennsylvania and Ohio have laws that take up these matters, and those laws certainly should be enforced. As I understand it, this statute should not be enacted to say to New York or Pennsylvania or Ohio, "You have a certain law that must be respected." It seems to me that that should go without saying.

Senator NELSON. Let me put a case to you: You people in California do not believe in Chinese immigration.

Mr. JULLIARD. No; not very much.

Senator NELSON. You do not like to have the Chinese come there. How would you like to have a law say that other States could dump Chinese people into your State whether you wanted them or not; how would you like to have the law in that condition—that Chinese immigrants could come into California from other States contrary to your policy and contrary to your law?

Mr. JULLIARD. That is very easily answered, because we can not conceive—

Senator NELSON. But suppose that was the case. Suppose other States should insist upon sending Chinamen in there?

Mr. JULLIARD. For the purpose of argument, I will concede that such a law could be enacted. However, I will try to answer your question. Supposing a State had prohibition, and we from California insisted upon attempting to send our products—our wine—into the State, even as against local laws. We say this: We are fair enough to admit and say this, sir, that such would be wrong on our part, and we think that the State of Nebraska, the State of Oklahoma, the State of Kansas, or any of these other States that have laws upon this subject, are strong enough and have sufficient police power vested in their officers so that they can protect themselves and that it is unnecessary to entangle the statutes of the United States with any law whatsoever upon the subject. Under the example given should California be the only State prohibiting Chinese, the California law could not be appealed to nor enforced until Chinese had entered or were actually entering that State. If the California law was violated, then the officials of that State could act and enforce its laws without Federal assistance or permission.

In other words, sir, if you are going to have a local law construed by a Federal court, or vice versa, who is going to say that that law has been violated? I say there are numbers of questions arise—and I promise not to talk about the legal phase—but it does arise, and you as an attorney must see that. The trouble is, sir—I really do not know the cause, although I am informed, possibly, if a State law is sufficient it is sufficient unto itself for the purposes for which it is intended. If it is defective, it can be amended.

Senator NELSON. Here is the question. This is not as expressing my views, but what other people claim. While they say their own State laws are sufficient for their own people, yet they are not sufficient to protect them against the inroads of outsiders.

Mr. J. J. JILLIARD. But as soon as I come into the State of Nebraska I am bound by the local laws there, and you and I know it, and everybody else is informed upon it; if I do a certain act it may not be a crime *per se*, but it may be a crime according to the statute. It may be something I am permitted to do outside of Nebraska without fear of punishment, without evading a law or breaking a law, but it is something that I can not possibly do in Nebraska; it is a local matter entirely, and that law, of course, is good so far as Nebraska is concerned, and we do not desire to interfere with the laws of Nebraska at all, or say to Nebraskans what they shall do. But there is danger in this, that when we ship most of our wine—and most of our wine goes through that State on its way to Chicago and New York—might not our shipments be held up? And the language of this bill is such that there is no property in that wine. To tell you honestly, I doubt if that is a good law. Here I am arguing this question again, although I am not a constitutional lawyer. But I say, knowing a little of the Federal Constitution, knowing a little of those cases decided thereunder, it does strike me that there is a great danger there, declaring that we can have no title in certain property. I think that is a very serious question, Mr. Chairman, and I say it is a matter local entirely. There is no crime committed until you get that wine into Nebraska. Then how can you declare that a contract made in California by the laws of Nebraska, perpetuated by United States statute, is a crime?

No; that can not be done. But is not that the effect of this proposed law, however?

It does seem to me, Mr. Chairman, that this proposed statute is unnecessary; that as shippers of wine and growers of grapes we do not oppose it for the reason of opposing it, but as fearful of the danger that is likely to result. Supposing there should be an honest mistake made. We do not know—and there are plenty of growers who ship direct, men who make their own grapes into wine, and ship directly into this and the other States, that personally do not know and are not informed that certain local laws—and there are certain portions of a State very often where they have prohibition and where they do not have prohibition in the whole State; that is true in California. Then this law applies to California as well, to the restricted territory, does it not? Undoubtedly. It would apply to parts of Iowa; it would apply to parts of Texas, which is not a prohibition State. But there are restrictions in certain counties in many of the States where they do not have State-wide prohibition.

Then, uninformed as we are, 2,000 miles distant, uninformed as is the express company or the transportation company, there might be accepted at a depot in California a shipment of wine which would be sent on its way, and then the discovery made in transit, and before it reached its destination, it being destined to a restricted territory, this law says: "You can not appeal to any court, at least to a Federal court, seeking to get that wine back, because there is no property in that wine." Is that true? Can it be that a man's property can be confiscated that way? I doubt it, sir. And while, as I said before, I am not prepared to take up the legal part of this, and prefer that others should do that, it does strike me, Mr. Chairman, that this should be given a great deal of thought.

I thank you in behalf of Mr. Priber and myself for this opportunity you have afforded us to be heard. I am sure that this committee will consider this question carefully, give it the careful thought that it deserves, and that we will be given exact justice.

Senator NELSON. Do you wish to be heard, Mr. Priber?

STATEMENT OF E. C. PRIBER, OF CALIFORNIA.

Mr. PRIBER. Mr. Chairman, I am only a grape grower; I am not a statesman, like the gentleman from Minnesota. I am a grape grower from Napa County, Cal. When we heard about the Kenyon bill we got scared, because it prohibits. We did not care very much about the prohibition States when they prohibited our wines from coming in, because they came in anyway. The States are very liberal. I know, for instance, in the State of Tennessee, which is dry, that there is a tacit understanding between the authorities and the trade that Memphis can receive all the wine they want; and I am positive that if I met to-day the Senator from Maine and he invited me to dine with him at his house, he would be glad to place before me at the dinner table one of the finest bottles of California wine that is to be had.

But when Uncle Sam prohibits he prohibits; and it is a good thing that he does, and we want it so; but we can not afford that, gentlemen. We can not afford that. When he prohibits us from taking wine into a State, that will be real prohibition. I do not think the sovereign States of the United States need any police power from Uncle Sam. If California does not want Chinamen coming in from other States, they will keep them out without the help of Uncle Sam.

I will not detain you any length of time. California is about in the same situation in the United States that France is in in Europe. It is the natural wine country. What would you think if the exportation of French wines into the other countries of Europe was prohibited? What would become of France in such event? And so, what would become of California if you should rob us of our vine-clad hills? Do not do it, gentlemen. Have regulation by the States, but not in the name of the United States.

Senator NELSON. Are there any others who want to be heard in opposition to the bill? If so, we will give them a hearing. If not, if there is no one here in opposition, we will give a hearing to those who are in favor of the legislation.

Senator BORAH. I understood Mr. Caldwell was here from Oklahoma and wanted to be heard.

Senator NELSON. Are you opposed to the legislation?

Mr. CALDWELL. No, sir; I am not.

Senator NELSON. Then just a minute. Is there anybody here opposed to it?

Senator BORAH. I think you had better give notice to those who are opposed to it that they had better take advantage of this opportunity.

Mr. CALDWELL. I came specially to be here to-day, because I understood that Mr. Lawrence Maxwell, of Cincinnati, was going to be here to speak against the measure, and it was with a desire to hear

what he might say before I should make my remarks to the committee that I am here at this time. So I would prefer to wait.

Senator NELSON. He is not here to-day, and I have been informed by a Member of the House that they have been trying to get him for two months, and he has failed to appear before the House Committee on the Judiciary. I do not know when he will come; I can not give you any information.

Mr. COOKE. Mr. Maxwell is finishing the trial of a case to-day at Columbus, Ohio, before three circuit judges. It is in one of the Sherman antitrust cases.

Senator NELSON. There are five members of this committee; that outnumbers the court.

Mr. COOKE. He wired me yesterday that he would be unable to finish before to-day. He will be in Washington on the 5th and 6th of March to appear before the Judiciary Committee of the House. He would be glad to appear before this committee at the convenience of this committee any time after to-day. I am sure he will be pleased to be present. I do not exactly see that the proponents of the measure should hear the adversaries of it before they themselves support the validity of the proposed bill. The bill on its face carries with it a very questionable constitutionality, and the proponents of the bill might well make their case in its behalf before they have to hear those who are opposed to it.

Senator BACON. I would suggest that we give notice that they must be heard next Saturday if they want to be heard at all.

Senator NELSON. Yes; we will close the hearings on these bills next Saturday. If Mr. Maxwell wants to be here, he can come, and if he does not, that will be our last hearing.

Mr. COOKE. Will it be possible to have a hearing before Saturday?

Senator NELSON. No, sir.

Mr. COOKE. The day set, then, is Saturday next?

Senator NELSON. Yes, sir.

Mr. COOKE. That is the closing of the hearings?

Senator NELSON. Yes, sir. You may go on, if you desire, Mr. Caldwell.

Senator BACON. Do you wish to wait until next Saturday to be heard?

Mr. CALDWELL. Of course, I came here to-day expecting to appear before the House committee. I would prefer not to make my statement before this committee now for this reason: I would be at a loss to know just what particular criticism I should address myself to. The gentleman says that there are very obvious constitutional objections to the bill that appear upon its face. I can not agree with that, and until those are pointed out I would think that I would be wasting the time of the committee and perhaps not speak to any decided advantage.

Senator BACON. There will be no trouble about your being heard next Saturday if you are here.

Mr. CALDWELL. Then I will wait until next Saturday.

Mr. COOKE. I suggest that Mr. Maxwell or anyone else would be at a disadvantage in discussing this bill from the standpoint of its constitutionality inasmuch as he has not heard Mr. Caldwell.

Senator BACON. The constitutionality of the bill has been presented time and time again—

Mr. COOKE. Once before this committee?

Senator BACON. It is in the record; it has been printed.

Mr. COOKE. That is Mr. Dinwiddie's presentation, and he states that Mr. Caldwell, of Oklahoma, has drafted the measure. Possibly he is a lawyer and will be able to present the full case in its behalf. We are able to discuss the bill without hearing the other side, but that they should hear us before having discussed it in chief, and presented their case, it seems to me as rather contrary to the usual procedure.

Senator BACON. If Mr. Maxwell had been here he would have been heard. He can not expect this committee to wait for him to suit his convenience.

Mr. COOKE. I am sure that he has not expected that. He has been engaged in other matters which he could not leave.

Senator BACON. We are engaged also. He ought to make his engagements conform to the convenience of this committee, or else have some one else represent him here.

Senator NELSON. You can take your choice, whether you want to make your statement to-day, Mr. Caldwell, or wait until after Mr. Maxwell has made his.

Mr. CALDWELL. We understand that the time will be fairly divided if next Saturday is to be the last day. I would prefer to wait.

Senator NELSON. Is there any objection to that?

Senator BACON. I have no objection. Then, after Mr. Maxwell is heard, Mr. Caldwell will be heard, and then, in turn, Mr. Maxwell may have a short rejoinder, I should think. The point I make, however, is that Mr. Maxwell seems to think that this committee should fix a hearing for him to suit his convenience.

Mr. COOKE. That may be the feeling among some of the members of the committee, but I am sure without Mr. Maxwell having that feeling at all. I am sure he has done his best to be here.

Senator BACON. We have had many meetings postponed, and this meeting was fixed to-day for the special benefit of Mr. Maxwell.

Mr. COOKE. I wish to make the record clear on this: That he would have been here except for the fact that he was engaged in the trial of a case before three judges of the circuit court of the sixth district, under a certificate of expedition secured by the Attorney General, in a proceeding under the Sherman Antitrust Act.

Senator NELSON. Why did he not come to our last hearing?

Mr. COOKE. That case was not pending at that time. He was preparing that case and preparing his argument. He could not speak without any preparation, at least he could not make such an argument as he desired to make and which probably this committee would like to hear, without preparation.

Mr. PRIBER. In case the grape growers would come up next Saturday before you, would you hear them?

Senator NELSON. Certainly; but we will have to hear those gentlemen first who wish to speak on the constitutional question.

Mr. PRIBER. But you will hear the grape growers?

Senator NELSON. We will hear you.

Mr. JULLIARD. I believe there would be only one more of us to be heard, and that is Mr. Sbarboro.

Senator NELSON. And if you want to file any brief here, you may do so.

Mr. JUILLIARD. I am very glad that we may have a continuance until next Saturday, for as far as we are concerned, we came on a moment's notice. I think we would be very glad to hear from the attorney you mentioned, Mr. Maxwell. I think I know him personally. Next Saturday, then, will be the final hearing?

Senator NELSON. Yes, sir.

Mr. DINWIDDIE. Can I say just a word?

Senator NELSON. Yes, sir.

STATEMENT OF REV. E. C. DINWIDDIE.

Mr. DINWIDDIE. I have no request to make in reference to hearing anybody further than Mr. Caldwell. I would like you, however, to know this: Notwithstanding that we shall have a number of lawyers here next week from different States in the Union, from Maine to Idaho, inclusive—I do not know whether they will come from the coast or not—but it seems to me that we ought not to take any more of your time than is absolutely necessary. I happen to know that Senators have a good deal to do, and you indicated when you set this date for Mr. Maxwell that you took up the arbitration treaties on the 5th, and that it might not be convenient for you to hear anybody during the week. So I just want you to know that we will have a great many people in the city mightily interested in the legislation next week, but we do not feel like asking you to hear them, if you will accord this courtesy to Mr. Caldwell, who prepared this bill from his experience as an officer of the State of Oklahoma. I only ask that the hearings will be concluded as speedily as may be proper and that you will take up the matter and act upon it if possible.

Senator BACON. Mr. Chairman, if there are no outsiders who desire to be heard, Mr. Webb, a Member of the House, desires to say a few words.

Senator NELSON. We will be glad to hear from Mr. Webb.

STATEMENT OF HON. EDWIN Y. WEBB, A REPRESENTATIVE IN CONGRESS FROM NORTH CAROLINA.

Mr. WEBB. Mr. Chairman, I am interested in this particular bill because last April I introduced an identical bill, with the exception of section 2, known as the Sheppard amendment, and this bill, with the exception of section 2, is now being considered by the Judiciary Committee in the House, of which committee I happen to be a member, and we have been considering it patiently for more than two months over there, and our friend Mr. Maxwell has not appeared so far to assault the constitutionality of this measure. I understood that Mr. Maxwell was to speak before this committee to-day, that this date had been fixed to suit his convenience, and I really came here this morning to hear Mr. Maxwell's argument on the constitutionality of the bill.

I remember the first day we had a meeting of the House Judiciary Subcommittee to consider this bill Mr. Cook was there and said they would like to have some little time in which to prepare an argument, and asked that February 7 be set as the date for a meeting, when Mr. Maxwell would be there.

Mr. COOKE. Pardon me, but that is not quite correct, Mr. Webb. It seems that this is principally a discussion in regard to Mr. Maxwell, rather than a discussion of the matter pending. Therefore I think we ought to have the facts stated accurately. I stated that Mr. Maxwell would be in the city of Washington February 7, at which time his appearance before the committee could be arranged; and after February 7, when he was here, your committee set the hearing for March 4, 5, and 6, and Mr. Maxwell arranged his dates so as to be here at that date. In the meantime he expected to prepare what he had to present to the committees of the House and the Senate upon this measure. I made no statement that he would be here on February 7, and I wish to say now before this Senate subcommittee that there has been no effort in the presentation of this part of the case to delay the consideration of these bills by any committee of Congress. We are willing to meet the issue on the constitutionality of this measure now, but we do not wish to meet it as precipitately as the gentlemen who support the bill seem to wish to present the validity of it. We can not do it. The bill is unconstitutional and void as a proposed act of Congress. Now, then, we have got to demonstrate that, and we will demonstrate that, but we can not do it instantly.

Mr. WEBB. It is so clearly unconstitutional and void, I should think my friend would be able to demonstrate it without asking for any further time. I assert again that Mr. Cooke was present at the first hearing and asked for delay until the 7th of February, stating that Mr. Maxwell could not be heard and could not get to the city until that time.

Mr. COOKE. I said that on February 7 I could state when Mr. Maxwell would be able to appear.

Mr. WEBB. Well, I will not bandy words about it, it makes no difference. I know that Mr. Carlin, the chairman of the subcommittee of the Judiciary Committee of the House, stated to Mr. Cooke last week that he had written letters to the wholesale liquor people and others interested, asking that they come before his committee and present any arguments that they may desire to present, and that up to that time nobody had appeared to assault the constitutionality of the bill.

Mr. DINWIDDIE. He said they could come any Monday, Wednesday, Friday or Saturday.

Mr. WEBB. Yes; the court has been open over there for two months.

Mr. COOKE. I can speak only for the National Liquor Dealers' Association. Their record in the matter is clear, and I do not want to have them prejudiced by any suggestion that it is not.

Mr. WEBB. The idea presented by Mr. Cooke that the proponents of the bill should show its constitutionality before its constitutionality is attacked is a new proceeding to me. I think when a United States Senator introduces a bill, under his oath as a Senator to support the Constitution, that it is presumed or assumed that the bill is constitutional until it is attacked, and if our friends desire to destroy the bill on the ground that it is unconstitutional they ought to be here now trying to show that fact. If it is so clearly unconstitutional and void surely it would not take a lawyer like Mr. Crain or Mr. Maxwell to prove it.

Mr. COOKE already knows the position we occupy in reference to this bill. He has a carbon copy of a statement of our position, and I suppose Mr. Maxwell has it now. It seems to us that they have wanted us to give them our authorities before we get their authorities. It makes no difference. Our position, as I say, is well known.

Briefly our position is this: That it is not the right of any citizen of either the United States or of any State to make or sell whisky, alcoholic or otherwise.

Mr. DINWIDDIE. No inherent right.

Mr. WEBB. No inherent right. I need not cite the committee to the case of *Mugler* against Kansas or of *Crowley v. Christiansen*, one of those cases being argued by Senator Vest on one side and Mr. Choate on the other side. Those decisions, I presume, have settled forever in this country the question that no man has an inherent right as a citizen of the United State, or as a citizen of any State, to make or manufacture or sell whisky.

The next question upon which we plant ourselves with reference to the validity of this bill is this: That the commerce power—that is, the power over interstate commerce—having been delegated entirely to Congress by the States when the Constitution was formed and adopted, that the Federal Congress has the exclusive and absolute right not only to control and regulate the interstate shipments of whisky, but, if they choose, to absolutely prohibit it.

I will state to this committee frankly that I did not want to come to that conclusion about the power of Congress over interstate commerce, but after reading all the authorities, both historical and judicial, I was forced to that conclusion.

Senator BORAH. As a matter of law, not perhaps having very much bearing on this case, but indirectly so, how far would you carry the proposition that Congress could take out of the hands of any State the control of any property that the Federal Government might seek to exclude from the States? In other words, what I wanted to get at was this: Do you distinguish between liquor and other commodities in making the statement you make?

Senator BACON. Between things deleterious and things that are recognized as not deleterious.

Mr. WEBB. I will say this: That for the purposes of this bill it is not necessary to go any further than I have stated.

Senator BORAH. I think that is probably true.

Mr. WEBB. There is a difference. There is a difference under the laws of this land between liquor and other commodities, like wheat and corn, because every man has an inherent right to raise wheat and corn and to make flour.

Mr. PRIBER. And to raise grapes?

Mr. WEBB. Yes; to raise grapes. But you can not make whisky unless allowed by the State. There is a marked difference between those two commodities, so far as the opinions of the courts are concerned. But I realize that when the Constitution was framed that we took out of English law this phrase, "To regulate commerce," and I believe it has been stated by high authority that at the very time this Constitution was framed there were 20 or 30 laws in England entitled "An act to regulate commerce," and in each one of those acts commerce was absolutely prohibited.

If that is a fact—and it is very interesting to me, because there has been much speculation as to the power of Congress over everything that goes into interstate-commerce channels—I am driven to this conclusion: That before the Constitution was adopted each State had the right to prohibit the entrance into that State anything and everything, and that caused the fathers to get together and say: “There are too many different laws in reference to commerce, because each State has the sovereign power to exclude whatever it pleases, and we had better have some central head to exercise this plenary and absolute power.”

Therefore, when they formed the Constitution they took that power from the States and lodged it in the hands of the Federal Government. Now, the Federal Government has absolute control over all interstate commerce, or else some power which was intended to give the Federal Government from the sovereign States has been lost or suspended somewhere.

But, as I say, Mr. Chairman, it is not necessary to go that far in passing upon the constitutionality of this act. So far as the power of Congress to exclude deleterious articles and those not deleterious, there is no such line of authority or decision which says “You can exclude deleterious matters and you can not exclude other things,” because a lottery ticket is not a deleterious matter. It is no more harmful than any other piece of paper. And yet the Supreme Court has said that Congress has the power to exclude a lottery ticket from the mails and from interstate commerce. That was not because it was deleterious.

Senator NELSON. That was on moral grounds.

Mr. WEBB. They did not put it on moral grounds. They had to march up to the question finally and say, “Congress has the power to do it,” and we have no right to inquire why they did it.

It is true Justice Harlan did say that the States had denounced and had condemned lotteries, etc., and if States had the right to do it and had done it, the Congress of the United States ought not to be impeded in its right and power to exclude them from all commerce.

Now, following along that line—I forget just when the statute was passed, but the Congress passed a law forbidding the shipment of any loose hay in any steamer going from the United States. Hay, whether it is loose or packed, is as good and wholesome as any other article.

Senator BACON. Was not that on the ground that it was dangerous to carry it loosely?

Mr. WEBB. No, sir; Senator. I may say it was not.

Senator NELSON. Was it not on the ground that it was dangerous to have hay packed in loosely on a vessel, on account of the danger from fire?

Mr. WEBB. That is what made Congress pass the law and adopt that policy, but the policy did not give Congress the power. Congress had the power to prohibit this hay from being shipped.

Senator NELSON. In any form?

Mr. WEBB. In any form, it seems.

Senator BACON. Did not the power rest on the fact that it was dangerous?

Mr. WEBB. I do not think so.

Senator BACON. We have various other statutes about opium and other things, such as explosives, prohibiting their transportation in interstate commerce or prohibiting them from being brought into this country.

Mr. WEBB. I will say this to the Senator. In 1897, I believe it was, and in the Payne bill of 1909, the Congress prohibited the importation of any goods that were made in whole or in part by convict labor, and, of course, a piece of goods made by a convict is no more harmful than any other goods.

Senator BACON. I do not want to be responsible for all the laws passed since I have been in Congress.

Mr. WEBB. I realize that; and I know that the Senator voted against that bill.

Senator BACON. I did.

Mr. WEBB. I wish I could find a line of demarcation between the prohibition of those things that are deleterious or harmful and those things that are not; but even if you feel that Congress only has power to prohibit those things deleterious and harmful you need not go one step further when you consider this bill.

Senator BACON. I do not think it is necessary for your argument.

Mr. WEBB. No, sir.

Senator NELSON. The United States Supreme Court has practically held that because of that fact they are subject to the police power of the States.

Mr. WEBB. Yes.

Senator NELSON. Put it on that ground.

Mr. WEBB. That is right. In the case of *Mugler v. Kansas* and in the case of *Crowley v. Christensen*, Justice Harlan said, "We can not close our eyes to the fact that much of the crime perpetrated in the United States comes from the excessive use of alcoholic liquors," or something to that effect; and it has been stated by State courts over and over again.

I believe Phillips is an authority accepted by both wet and dry men, and he says that 1 man out of 20 every year dies from the excessive use of alcoholic liquors.

So we know that whisky is dangerous to health. Congress has always regarded it as dangerous to health and good order. They will not let a man sell whisky to an Indian that comes here to Washington and walks along the streets of Washington.

Senator NELSON. Congress has even reformed in my day. They used to sell liquor in the restaurants at both ends of the Capitol. We have quit that business in the Capitol.

Mr. WEBB. That is true, sir; and that leads me to say that ideas on these questions progress and change. The time was that Congress licensed and authorized lotteries. The time was that Congress authorized slavery. The time was when every man had a right to make whisky. But slavery has been abolished, lottery tickets are prohibited, and public opinion is gradually crystallizing against the sale and illicit traffic in whisky in the United States. That is the ground upon which—

Senator NELSON. I want to call attention in connection with your remarks to the fact that in the early history of this District a lottery was authorized. Congress authorized a lottery here in the District of Columbia.

Mr. WEBB. Now, Mr. Chairman, in order to let our friends who oppose the bill know just our position—and I think I know it—I have stated, first, that no one has an inherent right to make or sell whisky. The second proposition is that Congress has absolute plenary power to exclude all whisky, if it sees fit, from interstate commerce. I need not argue that the power to regulate commerce with the States and the Indian tribes is the same as it is to regulate commerce with foreign nations. It has been said in a dozen different cases by different courts that the power to regulate commerce between the States is just the same, no more and no less, than it is to regulate it with foreign nations.

Mr. COOKE. I would like to see any of those cases, if you can cite them—the authorities that give those points.

Mr. WEBB. Yes; I have them. For instance, in the case of *Cruthers v. Kentucky*, wherein they say that it has been stated numbers of times that the power of Congress to regulate commerce between the States is as plenary as with reference to commerce with the Indian tribes and foreign nations.

Senator BORAH. They said so in the Northern Securities case.

Mr. WEBB. Yes; I thank you for that reference. Among other things, the court referred to the power to regulate commerce with foreign nations, and the court went on to say that the power to regulate commerce between the States was as plenary as with reference to commerce between foreign nations.

Senator BACON. I think the first utterance of that kind was by the justice who rendered the decision in the case of *Gibbons v. Ogden*.

Mr. WEBB. Yes, sir. I think, however, that we can go back even further than that. So we say that Congress has power, if it sees fit to do so, to exclude all liquors from interstate commerce. And we say it has the power.

Senator NELSON. There are some points I would like to hear you on, not so much for my own benefit as for others who are present here. There are several features of the bill that I would like to ask about. I understand that there is no State—that no so-called dry State prohibits the use of liquor.

Mr. WEBB. That is correct.

Senator NELSON. And no law in any State that prohibits a man from buying liquors directly for his own use.

Mr. WEBB. That is true, I think.

Senator NELSON. And that is the case in every State?

Mr. WEBB. Yes, sir; I think so.

Senator NELSON. Would not that right still exist under this legislation; would it not leave it simply so that it would prohibit the manufacture and sale of liquor in those States that have prohibition laws, but it would not prohibit men from ordering liquor for their own use? Would not that be the result of this legislation under existing State laws?

Mr. WEBB. Absolutely, under existing State laws. I do not know that it would prohibit anybody receiving any whisky under existing laws unless it would be contraband liquor that was shipped to a "blind tiger" or keeper of a "speak-easy," to be used in violation of the law of such State.

Senator NELSON. I mean liquors for a man's own use.

Mr. WEBB. Yes, sir.

Senator NELSON. And it would not interfere with the shipment of wine to any of these States by people who had bought it for their own use?

Mr. WEBB. I do not think so, because there is no State law that prohibits a man from receiving it or using it now; and I say this: That if a State in the future should do it, it has a right to do it, because the Supreme Court of the United States has said it in a number of cases.

This law applies to "wet" States as well as "dry" States, because all the "wet" States have laws against the illegal sale of whisky.

Some people call it a law to prohibit the shipment of whisky into dry States. It prohibits the shipment of whisky into any State if it can be shown it is to be used in violation of the law in that State. It simply withdraws the unconscious or silent partnership of the Federal Government with the violators of the laws of the several States, whether they be "wet" States or "dry" States.

I come back to the proposition that Congress has power to prohibit the transportation of all liquor in interstate commerce. I want to say right here that upon a former hearing before this committee, and I think all you gentlemen were here, the question was asked Mr. John W. Yerkes, who appeared in behalf of the breweries of the country, I think Senator Bacon asked him the question, "I want to hear you on the constitutional power. Do you think Congress can exclude all liquors?" Finally Mr. Yerkes, in effect, said "Yes."

You had a bill before you then which attempted to delegate some of this sovereign power to the States, and Senator Knox filed a very powerful opinion, as our opponents think, against the constitutionality of that sort of a measure. It was strong enough to make us who want some legislation on this subject change the position of our batteries, and we said, "All right; if Mr. Yerkes and Mr. Crain say that Congress can exclude all whisky from interstate commerce, and if Senator Knox seems to think that can be done, and if Mr. Crain says that can be done"—Senator Knox, in the running discussion, said that Mr. Crain, one of the lawyers that appeared in opposition to this sort of measure, thought it could be done by Congress—"then we say, 'All right; we will not ask Congress to delegate any of its sovereign power to the States; we will ask Congress to take hold and prohibit the shipment of any liquor in interstate commerce that is intended to be shipped or used in violation of the law of any such State into which it is shipped.'"

If Congress has the power to prohibit any shipment in interstate commerce of any liquor without assigning any reason whatever, I contend that Congress has the right to prohibit the shipment of any portion of that commerce, with or without reason, because the larger power controls the smaller and the smaller is involved in the larger.

I hope to make myself clear on that point—that if we have power to prohibit the shipment of all whisky absolutely, arbitrarily, then we have power to prohibit the shipment of any particular class or part of that whisky, because necessarily the smaller is included in the larger power.

That is what this bill does. It does not prohibit the shipment of all whisky in interstate commerce. We do not ask that. We only ask that for the purpose of letting the States control the matter for themselves we will prohibit the shipment of that whisky which is

found to be intended to be used in violation of the law of any sovereign State.

I contend, Mr. Chairman, that if our first premises are right, that we have the constitutional power to pass this kind of a measure.

Our friends who oppose this bill are very much interested as to how it will be executed. I want to say, respectfully and kindly, that they will not be interested in executing it. The people who advocate the bill will look after that.

Mr. COOKE. Pardon me, but would you mind discussing for a moment how you would proceed in actual practice to carry out the law. Take a specific case.

Senator NELSON. Would it not be more important, first, for them to tell us how they intend to get around it and violate it?

Senator BORAH. I am afraid you people are trying to catch on to one another's secrets.

Mr. WEBB. No indeed.

Mr. COOKE. We are quite innocent of any violation of the law. It is not the shipper who is guilty. It is some person who is directly or indirectly connected with a shipment in a State at some distance from the shipper. The shipper is quite innocent. For all he knows, the package is innocent, and for all he knows everyone who is going to use that package is innocent; but these gentlemen propose, at some time between the time the package is shipped and the time it is received in the State, to seize it and try it for a supposed violation of the State law. Now, I would like to hear Mr. Webb discuss a typical case of prosecution. I would like to hear the kind of information he would lay against the package.

Senator NELSON. You misapprehend the purpose of the bill. It is to prevent the wholesale liquor dealers from being tempted.

Mr. COOKE. But we can not be tempted so long as we do not know of anything we can violate.

Senator NELSON. They want to remove temptation from you.

Senator BACON. I do not know whether you were here at the first meeting we had, when a man who spoke gave an illustration of what he thought was the reason for the enactment of this proposed law. He said he lived in Georgia, in the town of La Grange; that there was a blind tiger outside the corporate limits of the town, and that on the week before Christmas that blind tiger received 8 or 10 casks, each filled with half-pint bottles of whisky.

Senator NELSON. Shipped from Jacksonville, Fla.

Senator BACON. He gave that by way of illustration. You ask for a typical case, and this is one that occurred to me, and I wanted to suggest it; possibly that might be a case where the authorities might proceed against that whisky on the ground it had evidently been purchased with the intention of selling it and violating the State law against the sale of whisky. It would be a question of fact to determine there—whether that was the intention—but it would be pretty strong presumptive evidence that that man had brought in that whisky in violation of the law when it was shipped in in that way, in half-pint bottles; it would be presumptive that he intended to sell those half-pint bottles.

Mr. COOKE. I recall that statement, and the statement that was made was that the sheriff had been pleaded with to arrest that man,

and said he could not do anything with him in the prohibition State of Georgia—

Senator BACON. Of course not; not until he attempted to sell it.

Mr. COOKE. But he was selling it.

Senator BACON. No.

Mr. COOKE. That was my recollection.

Senator BACON. No; I was talking about the operation of this law. If there were suitable or proper—and when I say a suitable or proper I mean effective—legislation by the State of Georgia as to the proceeding in such a case as that, there could be a proceeding where an issue would be made, “Has this man bought this whisky for a legitimate purpose or for the purpose of violating the law?” It would be a question for the court to determine whether or not that man had bought that consignment of 8 or 10 casks of whisky, containing half-pint bottles, for his own use or for the purpose of selling it, which would be a violation of the law. I suggest that is a case. You might say that is an extreme case, but it is a practical case.

Mr. CALDWELL. I would like to make this suggestion, if Mr. Webb will pardon me, and that is that the shipper can fully protect himself by getting his money in advance.

Mr. WEBB. They do that now.

Mr. CALDWELL. Then he has no interest in the liquor.

Senator BACON. If he knows that it is for the purpose of violating the law—

Mr. COOKE. The terms of the first section of the act are quite clear that the prohibition operates not upon the intention concurred in by the shipper, but existing alone in the mind of anyone connected with the shipper, directly or indirectly.

Mr. WEBB. That is right, and therefore the wholesale liquor dealer has no interest in it. I will say that the object of this bill is to get after the violators of the law in the States. We can not get after the wholesale liquor men, but we want to get after the man who violates the law in the State and gets the whisky from the wholesale liquor dealer, the man who buys the whisky and intends to sell it in the State where it is received.

Senator BACON. For the benefit of these gentlemen from California, I would suggest that a man who got a case of wine would not be under suspicion, that there would not be any presumption that he bought that with the object in view of violating the law, because a man buys a case of wine ordinarily for his own use, but it is not an ordinary thing for a man to order several casks of half-pint bottles of whisky.

Mr. JUILLIARD. If that be the purpose, I suggest to you that the usual way of drawing a law is to state in the law itself the purpose. I understand this is a United States statute; it is effective in itself. Is it not a fact that if you wish to exempt certain classes that you would put that exemption in the law itself?

Senator BACON. The law only proposes to make a regulation which will apply to those who are intending to violate the law.

Mr. JUILLIARD. Pardon the discussion, but to violate what law?

Senator BACON. The law of the State.

Mr. JUILLIARD. The local law?

Senator BACON. Yes. Therefore, if the local law does not prohibit me getting a case of wine for my own use, I would not in any way be interfered with by this proposed law.

Mr. JUILLIARD. It is not possible that you are desiring to inflict punishment for a thought or intent to violate law.

Senator BACON. The intention is to outlaw a shipment which is made for the purpose of violating a law of a State.

Mr. JUILLIARD. Yes, sir. I am addressing myself as well to Mr. Webb—

Senator BACON. That is the intention, as I understand it.

Mr. JUILLIARD. I am much interested in the gentleman's discussion, but I could not help asking the question.

Mr. WEBB. Yes; we have statutes passed by Congress, I think, which are on all fours with this. We have authority for adopting the statutes of a State as Federal law in the Lacey bird law, and authority for it in the criminal code which makes any person guilty of violating a Federal law where he violates a State law on certain reservations in the States. There is nothing to prohibit us from doing that if we see fit to do it.

The Lacey bird law, as I understand it, prohibits and makes a common carrier guilty of a crime if a common carrier transports a bird which is killed or shipped in violation of any law of any State, and provides the birds can be shipped out if the State law does not prohibit it. In that case, therefore, we make the Federal laws fit in with the State laws. Why should we not do that? There should be some reciprocation between the Federal laws and the State laws, especially when they try to regulate these great evils.

Mr. COOKE. You do not contend that the bird law is analogous with this proposed statute?

Mr. WEBB. So far as it makes the violation of a State law the violation of a Federal law it is analogous.

Senator NELSON. I would like to ask Mr. Cooke, in view of what has been suggested, if it is not as important to protect human beings as birds?

Mr. WEBB. I made that argument last week before the House committee. The people of this country wanted to protect song birds and game birds, and they got together and said, "In order to keep up these variety of birds it is necessary to protect them and let them propagate, and the only way to do it is to prohibit them being shipped in interstate commerce, in violation of the laws of any of the States." And so that law was passed, and it has been to the circuit court twice, and so far has not been declared unconstitutional. I do not know that the constitutionality of the law has been attacked, because I think the two cases decided under that law that have gone to the Supreme Court turned on some other point.

The time was when a man had a right to ship whisky into a dry State or local-option county, and the consignee not only had the right to receive it, but sell it in the original package. When the Wilson law was up for discussion, which law undertook to take that right away, our friends came here. Of course, they said it was depriving a man of personal liberty. But notwithstanding that hue and cry the bill was passed, and the Supreme Court declared that that law did

take away some of the interstate-commerce quality which theretofore had adhered in that article. That applied only to liquor. It does not apply to all things. The only two things that Congress has prohibited being sold in that way are liquors and dead birds killed in violation of the law of the States, and both of those laws apply just as the Wilson law applied. Any person can ship his whisky into a dry or wet territory and that person has a right to receive it. There is a period between the arrival of the whisky in the express office and the time it is delivered to the consignee over which the power of Congress still exists, and the State has no right to step in.

I will give you a case. I know a town in North Carolina where there are three or four notorious blind tigers, and the keepers of those places are very smart and shrewd. After they have violated the law for many years and after they have been put to work on the roads, as they have been, they are still doing business, and it does not seem possible to stop them. Suppose my friend should ship to one of those blind tigers in that town a barrel of liquor? It is against the law to sell it or manufacture it. Suppose that barrel of whisky arrived at the express office, and that the keeper of the blind tiger should be so bold as to come out and say to his prospective purchasers, "I have a barrel of liquor in the express office, and if you will wait until I can get it out without being caught I will sell you all you want." Suppose he made such a statement openly to those around him. Well, he passes by that express office and he sees an officer of the law watching him and he does not take it out. He comes back there later, and there is some officer there then, and he goes away without taking his whisky out of the office. He has declared his intention of violating the law, but the State can not step in and prevent him from carrying out his criminal intention. So there the whisky is, and it may stay there for a month, and he can do all the boasting he wants to about what he is going to do with the whisky, and perhaps have a war dance around it with his followers, but the State has no power to interfere, the hands of that sovereign State are tied; it can not under the present condition of the law say, "You have declared your intention to violate the law, it is obvious that you are going to sell that whisky, and so we will try the whisky and condemn it." I say that the sovereign States of this country ought to have the right to step in in such a case and try the question of the intention of the man to violate the law; they ought to have a right to proceed against the whisky.

MR. COOKE. May I ask you a question?

MR. WEBB. No; I do not care to be catechised by my friend Cooke. I have made by argument in his presence, and I want him to make his argument. I am not a witness here. I am trying to give you some light as to our position in this matter, and Mr. Cooke may communicate my statement of our position to Mr. Maxwell and let him come here and assault this bill.

They say, "You ought not to condemn an article because of the intent of the man who is going to use it." Well, that may be a question of policy to be argued, but it is not a question of power. If we can prohibit whisky entirely from being transported in commerce we can prohibit it, or any part of it, for whatever purpose—lawful or unlawful—we want to ascribe it to, and we have statutes now on the books, and they have been there for 50 years, which denounce the

property and condemn it if a man has intent to use it in violation of the laws of the United States. I refer to the building of slave vessels. The law provides that any man who shall build or bring into being any vessel intended to be used by such person in the slave trade, such vessel shall be forfeited and the person shall pay a penalty of \$2,000.

That is our law exactly, except we condemn the liquor if it is intended to be used in violation of the State law, whereas in case of the statute to which I have referred, the vessel is condemned if it is intended to be used in violation of the Federal law. The cases are analogous except in that respect. I believe the policy ought to be the same.

This law, Mr. Chairman, stripped of the verbiage as to the interstate commerce, prohibits the shipment in interstate commerce of any whisky, which whisky is intended by anyone interested therein to be received or possessed or used in violation of the law of the State. I submit that that is a fair law.

Senator NELSON. And it would not affect the goods in transit through a State—a prohibition State?

Mr. WEBB. Not at all, sir. I submit it is a fair law.

I am through, Mr. Chairman. I did not intend to make this argument. I intended to make a brief statement to acquaint my friend Cooke of our constitutional position, and if he hasn't it clearly now, we will give it to him more elaborately later on.

The following letter was ordered inserted in the record:

ITALIAN-AMERICAN BANK,
San Francisco, Cal., February 26, 1912.

HON. CLARENCE D. CLARK,
*Chairman Judiciary Committee, United States Senate,
Washington, D. C.*

DEAR SIR: Having been appointed one of the committee selected by the Grape Growers' Association of California to speak on the proposed bill to prohibit the transportation of wine from a wet to a prohibition State, and not being able to leave the city on short notice, I take the liberty of showing you by letter the reasons why this bill should not pass.

The grape industry has so developed in the State of California that it has been demonstrated by an intelligent European jury lately at the International Exposition of Torino, Italy, that this State now produces just as fine wines and champagne as that produced in the most favored countries of Europe. This is an asset to the State of California which will eventually be greater than its mineral and all other of its great industries.

It has also been demonstrated in late years that nearly every State of our Union can produce grapes which will make enough good, sound, fine wines with which to supply the entire people of the United States.

This great industry, if properly encouraged and fostered, will turn our unlimited hill lands throughout our great country into magnificent vineyards, creating new towns and cities, giving remunerative and healthy employment to many millions of farmers, and thus greatly enriching our country.

To attempt the suppression and ruin of this great industry of our country would be a most injudicious act, indeed.

The object of the promoters of this bill is evidently for the purpose of reducing and removing the evil of drunkenness from our country, but the true result of such action would be to increase instead of remove the great evil.

Every person who cares to investigate this great question properly will find that in all grape-growing, wine-making, and wine-drinking countries of Europe intoxication is almost unknown, whilst in countries where grapes do not grow and wine is not used by the mass of the people, such as England, Scotland, and Ireland, drunkenness prevails, unfortunately, to an enormous extent. In our own United States statistics will show that the Italian and French residents, who brought with them the custom of the use of wine at their meals, are

exempt from the evil of alcoholism as they were in their native country. Therefore the encouragement and fostering of the wine industry in the United States is the true and only remedy by which the greatest evil that our country is afflicted with can be mitigated and gradually removed, and therefore no restriction such as is proposed in the Kenyon bill should be permitted to hamper the easy distribution of wine throughout the country.

This may be further proven by the fact that when the canteen existed in our Army, where the soldiers could take at their Army clubs their wine and beer, alcoholism was very rare, whilst since the abolishment of this salutary measure the soldiers have been in the habit of going outside of the military quarters and taking stronger drinks in near-by dives and saloons. As a result drunkenness has increased to such a large extent that now we find the principal officers of the Army recommending the reestablishment of the canteen.

In fact, Dr. O'Reilly, Surgeon General of the United States Army, in his official report for the fiscal year ending June 30, 1906, showed that since the abolishment of the canteen 30 soldiers to the 1,000 have been treated at hospitals annually for alcoholism, whilst in the armies and navies of Europe, where every soldier and sailor is given a ration of wine at their meals, the rate of treatment for alcoholism is only one-eighth of one man per thousand which is equivalent to a ratio of 240 cases of alcoholism in America to one in the wine countries of Europe.

Even in the early days of our country the Presidents of the United States favored and recommended the use of wine by the American people, for we find in Washington Irving's life of President Thomas Jefferson, who had been minister to France, and who knew the salutary effect of wine, that he said:

"I rejoice as a moralist at the prospect of a reduction of duties on wine by our National Legislature. It is an error to view a tax on that article as merely a tax on the rich. It is a prohibition of its use on the middle classes and a condemnation to them of the poison of spirits.

"No nation is drunken where wine is cheap, and none sober where the dearthness of wine substitutes ardent spirits as its common beverage."

For the good of our country, gentlemen, I earnestly pray that you save the viticultural industry of America.

Very truly, yours,

A. SBARBOBO.

At 12.20 p. m., upon motion of Senator Borah, the subcommittee adjourned to meet Saturday, March 9, 1912, at 10 o'clock a. m.

INTERSTATE SHIPMENTS OF INTOXICATING LIQUORS INTO "DRY" TERRITORY.

SATURDAY, MARCH 9, 1912.

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE,
Washington, D. C.

The subcommittee met at 10 o'clock a. m.

Present: Senators Nelson (chairman), Dillingham, Borah, Bacon, and Rayner.

Senator NELSON. Mr. Maxwell, who was to have been heard first this morning, is not yet here. Is there anyone else present who would like to be heard in opposition to the legislation proposed in the bills before the committee?

Mr. EDGAR H. GANS. I represent the Distillers' Association of Maryland, of Baltimore, and I have arranged with Mr. Maxwell as to the opening. My talk will be supplemental to his. We have arranged it so as not to occupy too much time by going over the same ground.

Senator NELSON. Is there anyone else who would like to be heard?

Mr. TIMM. Mr. Chairman, I represent the National German-American Alliance.

Senator NELSON. We will give you a little hearing now, as Mr. Maxwell is not yet here.

STATEMENT OF MR. ADOLPH TIMM, OF PHILADELPHIA, PA., SECRETARY NATIONAL GERMAN-AMERICAN ALLIANCE.

Mr. TIMM. Mr. Chairman and gentlemen, we received your kind letter that was written on Saturday, March 2, but we were unable to notify our speakers in time for them to be here. We got your letter on Tuesday, March 5, while I was out of town.

Senator DILLINGHAM. Upon what subject did you propose to have them address us?

Mr. TIMM. I have no arguments personally to present to-day.

Senator DILLINGHAM. But upon what subjects did you propose to have these speakers to whom you have referred address us?

Mr. TIMM. On the pending interstate liquor bills.

Senator DILLINGHAM. Did you want them to address us on the legal aspect of it or the practical aspect?

Mr. TIMM. Some of them on the legal aspect. We have a gentleman here to-day who is the counselor of the State branch of Pennsylvania.

Senator NELSON. I would like to ask you, for my own information. What is the German-American Alliance, and what is its purpose and mission?

Mr. TIMM. We are a patriotic American association.

Senator NELSON. What is the mission and object, in general, of the German-American Alliance?

Mr. TIMM. To foster general culture, to protect the rights of the citizen, to advocate physical culture in the schools, to assist immigrants to become citizens of the United States, and so on. I beg leave at some time in the future to file with your committee a copy of our principles.

Senator NELSON. I simply asked you that question for my own information, because I am in the dark about it.

Mr. TIMM. I will mail you a copy of the principles of the organization.

Senator NELSON. Very well.

STATEMENT OF DR. C. J. HEXAMER, PRESIDENT OF THE NATIONAL GERMAN-AMERICAN ALLIANCE.

Dr. HEXAMER. Mr. Chairman and gentlemen of the committee, as the president of the National German-American Alliance, I beg leave to thank you for your courtesy in granting us this hearing. Permit me to state that the National German-American Alliance is a patriotic American organization, incorporated by act of Congress, the branches of which extend into every State and Territory of the Union, with a total membership of over 2,000,000. The members of our alliance have no ulterior motives for appearing before you; it is solely in behalf of good American citizenship that we come here from our homes to beseech you, not to pass any "prohibition" measure—for these bills, "To prohibit interstate commerce in intoxicating liquors in certain cases" are rank prohibition measures.

As Lyman Abbott has well said in his book, *America in the Making* (New Haven, Yale University Press, 1911, p. 71, etc.):

To William of Orange more than to any other one man is the credit due of discovering the principle of religious liberty. * * * It is for the twentieth century to apply the same principle to ethical differences. * * * The total abstainer has a right to demand that the saloon shall not be maintained as a public nuisance, and the German beer drinker has a right to demand that he shall not be banished to the milk dairy and the soda-water fountain. * * * Is it right to drink wine and beer? It is right for each individual to decide that question for himself and for the community to put such regulations on the sale of wine and beer, and only such, as are necessary to prevent popular excesses and public disorder. In brief, in a community in which religious ideals differ, religious nonconformity, with protection of the common right of all, has been found to be the solution. In a community in which ethical ideals differ, ethical nonconformity, with protection of the rights of all, will be found the solution. It is the only solution possible in a self-governing community.

It is on broad general principles such as these that we protest against the passage of the bills before you.

The following resolutions were passed by the national executive committee of the National German-American Alliance and were indorsed by the executive council of each State branch in every State of the Union:

Whereas it has come to our knowledge that another effort will be made to pass an interstate liquor bill; and

Whereas such a law would be a severe check to the volition of sane people and an encroachment on the personal liberty guaranteed to every citizen of our land by the Constitution: Be it

Resolved, That the National German-American Alliance most respectfully petitions the Members of Congress not to vote for such a measure and to use their best endeavors to defeat any such bill.

Resolved, That a copy of these resolutions be transmitted to every Member of Congress.

Similar resolutions, copies of which are now being forwarded to the House of Representatives and to the Senate were passed by our State branches and by about 8,500 associations and societies.

We respectfully petition your honorable body not to pass the measures now pending before you, because they are not only prohibition bills pure and simple, but also because they would foist on the Government of the United States duties that each State should perform for itself. They would, if passed, give rise to endless friction, creating serious disturbances, riot, and bloodshed.

Can any one who has studied the drink question actually believe that men can be made temperate through attempts at prohibition? Just as little as you can make men good and noble through the enactment of laws, just as little can you make them temperate through such agencies. Education, amelioration of surrounding conditions, physical culture (for the man or the woman who has been taught to take care of the body will be careful not to ruin it through strong drink), exercise, fresh air and sunshine through proper playgrounds and parks, wholesome recreation through free lectures, moving picture shows and other free amusements for the masses, will in time solve the problem, while attempts at prohibition will cause contempt for the law, will create lawbreakers, will be an additional incentive to try "the forbidden fruit," and in prohibition States will drive people to the vile stuff of the smuggler, the bootlegger, the speak-easy, the blind tiger, the gambling houses, the brothels, and other dens of vice. By such a law you will, in my humble estimation, help no one, but you will, on the contrary, create an endless source of trouble.

Hon. James C. Carter, for many years the recognized leader of the American bar, prepared a series of lectures to be delivered at Harvard University on "The law; its origin, growth, and functions." His sudden death prevented their delivery, and they were printed by G. P. Putnam's Sons in book form. In his discussion of the functions of legislation, and particularly of laws affecting personal liberty and the questions of local option and prohibition, he utters these wise words:

The principal danger lies in the attempt often made to convert into crimes acts regarded by large numbers, perhaps a majority, as innocent; that is, to practice what is, in fact, tyranny. We all are ready to agree that tyranny is a very mischievous thing. There is not a right understanding equally general of what tyranny is. Some think that tyranny is a fault only of despots and can not be committed under a republican form of government. They think that the maxim that the majority must govern justifies the majority in governing as it pleases and requires the minority to acquiesce with cheerfulness in legislation of any character, as if what is called self-government were a scheme by which different parts of a community may alternately enjoy the privilege of tyrannizing over each other.

As devoted citizens of this country we Americans of German birth or descent hold ourselves second to none in our devotion to the cause of true temperance and to all that makes for the sanctity and purity of the home and decency and order in the state; but we are bitterly

opposed to the passage of any law that destroys our rights of personal liberty; and for the protection of those rights we stand united as one body. As free and sovereign members of a free and sovereign people we believe that we have the right to regulate our lives and our homes as we see fit. The right to drink our wine and our beer and to import it we consider as absolute an attribute of human liberty as is the right to buy any other food. The divine right of each to pursue his own good in his own way should not be sacrificed to the fears and the fanaticism of those who regard or pretend to regard drink as a crime. We have never allowed our love of food and drink to degenerate into intemperance or to interfere with the good of the community, and we regard these bills as an unrighteous invasion of our manhood rights and of human freedom and as the most misleading and iniquitous measures ever introduced into Congress. We pray for its defeat, because this is the overwhelming sentiment of our population of German origin, roughly speaking, about one-third of our Nation. In proof of this statement I beg leave to state that there are about 700 newspapers published in the German language in this country, and, as far as I am aware, these have without exception approved of our stand. We Americans of German birth or extraction object to this bill because its passage would be a sad blow aimed at a fundamental principle of righteousness, sacred to every manly man. What is at stake, and let us not close our eyes to the fact, is the divine right of individual liberty—the right, as the great philosopher, Herbert Spencer, tersely put it, that “every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.” The strongest plea that can be put forward in favor of this iniquitous measure is that it would enable the governments of prohibition States to prevent persons to bring a glass of beer to their tables, because a prevailing majority in such States desires, or pretends to desire, this end. Let us hope, Mr. Chairman, that the spirit of liberty has not sunk so low in this our beloved Republic that national laws can be enacted to crush the individual freedom of an intelligent minority in States that can not enforce their own police regulations.

What shall other nations think of the ethics of a people that would pass a law, like the Sheppard bill, which in the second section contains these words:

SEC. 2. That there shall be no property right in or to any such liquor while in the possession of any railway company, express company, or other common carrier, in connection with any shipment or transportation thereof in violation of this act.

The spirit of intolerance is one repugnant to the spirit of the age and doubly so to every student of history and to every admirer of republican institutions. Especially should our national legislation be jealously guarded against the influence of the hysterical shrieks of fanaticism. In our national legislators we should have a stalwart bulwark against the erratic impracticable experiments that are sometimes tried by State legislatures, laws that are enacted by State legislators goaded on by the pricks of fanaticism.

Let us frankly ask, what has prohibition, in favor of which sane beings are now also to be bereft of their volition by national legislation, accomplished?

The answer has also been clearly given by a commission of eminent, unbiased men of national reputation. In their introduction of the results of an investigation of "the liquor problem," Charles W. Eliot, Seth Low, and James C. Carter have over their signatures stated:

There have been concomitant evils of prohibitory legislation. The efforts to enforce it during 40 years past have had some unlooked-for effects on public respect for courts, judicial procedure, oaths, and law in general, and for officers of the law, legislators, and public servants. The public have seen law defied, a whole generation of habitual lawbreakers schooled in evasion and shamelessness, courts ineffective through fluctuations of policy, delays, perjuries, negligences, and other miscarriages of justice, officers of the law double-faced and mercenary, legislators timid and insincere, candidates for office hypocritical and truckling, and officeholders unfaithful to pledges and to reasonable public expectation.

In every crisis, in colonial times as well as during our national existence, the German element in our land has stood for order and good common sense, and has always counseled well. As early as 1688 our forefathers at Germantown passed the first of all protests against slavery; what misery would have been averted had their advice then been heeded; their declaration for independence at Philadelphia antedates that of Jefferson; they fed and clothed the army of Washington at Valley Forge, they gave the cause of liberty a De Kalb, Steuben, "the Father of the American Army," a Herkimer and a Muhlenberg, a Stricker and an Armistead defended and saved Baltimore in 1814, about 200,000 of them fought and bled that not one star should be torn from the field of blue of our glorious banner, and when the fiat money craze spread over the country they, regardless of party, stood, as one man, for national honor and honesty, voting for sound money. We plead again to-day, because we honestly believe that the passage of this bill would be a grievous mistake, creating a precedent the final outcome of which can not now be foreseen, and because we feel that it would be an irreparable blow to individual liberty and the sacred institutions of our country.

In the words of that great American jurist, Hon. James C. Carter:

Any legislation which bears the characteristics of tyranny, as I have defined that term, is vicious in theory and has never yet succeeded, and never will succeed, in gaining its avowed end, or in having any other than an injurious effect; and I venture to add that if the zeal and labors which have been employed by what are called the better classes of society in efforts to enact and enforce laws repressive of liberty had been expended in kindly and sympathetic efforts to change and elevate the thoughts and desires of those less fortunate than themselves, a benefit would have been reaped in the diminution of misery and crime which compulsory laws could never accomplish. Moral ends can never be gained except by moral means. All the advances in civilization and morality which society has thus far made are due to the cultivation and development of those moral sympathies which find their activity in cooperation and mutual aid.

Senator NELSON. Is there anybody else present who would like to be heard in opposition to the bills before Mr. Maxwell gets here?

Mr. TIMM. I should like to file a protest of the State branch of Missouri against these bills.

Senator BORAH. The protest of whom?

Mr. TIMM. Of the Missouri State branch of the German-American Alliance; also a protest of the State branch of Colorado and one from the local branch of Boston and vicinity.

Senator NELSON. Those will be included in the record.

The documents are as follows:

PROTEST OF THE GERMAN-AMERICAN ALLIANCE OF MISSOURI.

To the Honorable the JUDICIARY COMMITTEE,

United States Senate:

The German-American Alliance of the State of Missouri is a nonpartisan organization, whose purpose is the preservation of the natural and personal rights of man as recognized and granted by the Constitution of the United States. We deplore the fact that we are compelled to organize in defense of these rights. For nearly a generation there has been a widespread movement and tendency to tinker with State and National Constitutions, aiming to supplant personal responsibility with paternalism, which would result in the effacement of individuality in citizenship—the basic source of national happiness and prosperity. We therefore petition your honorable body to report adversely on the interstate-commerce bill now before Congress, because its provisions malignantly interfere with commerce and ruthlessly destroy property rights.

We believe in a rigid interpretation of the Constitution—

1. That the Government holds all powers back not granted directly to the several States.

2. That the power to regulate does not imply the power to restrain or to prohibit commerce. That the paramount obligation of our Government is to secure life, liberty, and property.

Article 9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article 14, section 1, United States Constitution, says: "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States." Article 8: "No excessive bail shall be required, nor excessive fines nor cruel punishment shall be imposed," all of which have been inflicted on the public in local-option and prohibition States.

The Declaration of Independence reserves certain rights as inviolable. Article 14, in seeking to guard these rights once more against notional or opinionated legislation, clearly concedes such privileges. Much modern legislation is destructive of personal and property rights contrary to the meaning of "due process of law." Justice Brewer, in the *Walruff* case (Kansas), said, "If you want to reform, you must do justice at every step."

The clinching arguments of the professional reformers are the alleged crimes, ravages, and family wrecks of intemperance and the blessings of prohibition. Let us examine the facts established by statistics. United States mortality statistics for 1909 charge alcoholism with only one death in 350—the third lowest rate of all diseases. Carrie Nation founded a home for widows and orphans of drunkards in Kansas City, Kans., the largest city with the most blind tigers in the State; yet there has not been a single application for admission since its foundation six years ago.

Why do these bills not prohibit the traffic in patent medicines which contain, upon incontestable authority, from 12 to 47 per cent alcohol? Who absorbs these prepared toddies that brace the stomach and ease the conscience at the same time?

Dr. Wiley recently warned against the soft drinks of the drug stores.

The Kansas penitentiary report of June 30, 1911, gives the following records of the reputed good and bad counties of the State on commitments:

Shawnee County (good), with Topeka, the capital, 1 for 971 inhabitants; Johnson County (good), no city, no blind tigers, where they arrest and fine people for pitching horseshoes on Sunday, 1 for 716; Wichita, Sedgwick County (bad), 1 for 1,963; Kansas City, Kans. (bad), 1 for 1,325. This is in favor of the bad cities nearly 2 to 1. After 30 years of prohibition Kansas still has as many criminals, in proportion to population, as Missouri, with 5,000 bars and buffets.

Crawford County, coal-mining and brick industries and a large number of foreign laborers, sends 20 per cent less than Topeka, with the State government and prohibition and antisaloon headquarters. Johnson County, with no saloons, suppressed pool rooms, for 40 years the residence of Gov. St. John, the original apostle of prohibition, sends the largest proportion of any county in the State, the teachings and illustrious personal example of the ex-governor notwithstanding.

Kansas City, Kans., with 6 large packing houses, railroad shops, factories, etc., with the greatest conglomerate foreign population, sends 40 per cent less

criminals to the penitentiary than Topeka, the State capital, with all its sanctimonious influences. The process of redemption begins at the domestic fireside, not in the legislature.

We challenge anyone to disprove these statement, which attest the failure of sumptuary legislation conclusively.

Because 1 man in 350 abuses the use of liquor shall it be denied to the other 349?

Because a limited number of ministers are morally bankrupt shall the whole pulpit be condemned? Neither would be just.

Can there be any more glaring proofs of the fallacies of the antialcohol arguments?

Sixty years of it have not improved social or political conditions in Maine.

The western alcoholic nations are superior in mind and body to the non-alcoholic of the East.

We do not presume to know more or better than our Lord.

There is no misrepresentations in these figures, proving that there are no State lines between vice and virtue.

We contend that the provisions of the bills are in restraint of commerce, confiscatory, and destructive of personal property belonging to citizens of other States, and that they have no justification in law or equity.

Respectfully submitted.

A. P. SCHEURMAN,
President Missouri Alliance.

CARL GLEESER,
Secretary.

WM. HUTTIG,
President National Bank of the Republic.

H. C. LAMBERT,
Cashier German-American Bank.

JOSEPH STRAUB,
Vice President.

GUSTAVE KESTING,
Teller.

J. H. AHRENS,
Secretary Savings Bank.

EMIL PINKERT,
Capitalist.

WM. C. T. LENZ,
St. Louis

EMIL TOLKACZ,
President Iron Works,

A. W. HOFFMAN,
President Northwestern Bank.

Representing: German Hospital Society; Kansas City Turner Society; Bavarian Society; Saxony and Thuringia Society; Schwarzwaldler Society; St. Vitus Society; Suabian Society; German Military Society; Swiss Society; Baden Society; Austrian-Hungarian Society; German Veteran Society; Germania Maennerchoir; Edelweiss Singing Society; Beethoven Lodge; Modern Brotherhood of America, including 60,000 voters of Missouri.

PROTEST OF THE COLORADO BRANCH OF THE NATIONAL GERMAN-AMERICAN ALLIANCE.

Whereas there are pending before the committees of Congress several bills to prohibit interstate commerce in intoxicating liquors; and

Whereas the members of our organization are opposed to the passage of any bill of this nature; and

Whereas, owing to the great distance we are not able to attend any hearing on said bills before the committees of Congress, either in person or through a representative: Now, therefore, be it

Resolved by the Colorado branch of the National German-American Alliance, representing in its membership every citizen of German descent residing within the State of Colorado, That we condemn these attempts to hamper freedom as undemocratic, tyrannous, and fraught with the direst consequences; that any law of this nature, like every other sumptuary law, lacking the support of public

opinion leads inevitably to a disregard of all laws, in consequence of which a state of conditions is created which can only be deplored by all sincere adherents of law and order; that it is contrary to a spirit of fairness for the Government of the United States, after legalizing the manufacture and sale of spirituous liquors by the exercise of its taxing power, deriving large revenues therefrom, to restrict the implied privilege to limits wholly depending on the passing whim of any district or State; that it is beneath the dignity of Congress, at the behest of a minority of extremists, to thus interfere with the business of common carriers and to destroy the right of property in a commodity the manufacture and sale of which is recognized by law.

That we protest against these attempts to curtail the rights of the individual as against the spirit of our institutions and unworthy of a free and enlightened Nation.

Ordered that this protest be forwarded to our national officers for submission to the committees of Congress.

COLORADO BRANCH NATIONAL GERMAN-AMERICAN ALLIANCE OF THE UNITED STATES,

JOSEPH HAEFELI,
President.

JOHN HINRICHS,
Member National Committee.

FRANK KRATZER,
Secretary.

[SEAL.]

DENVER, COLO., *March 1, 1912.*

PROTEST OF THE BOSTON BRANCH OF THE NATIONAL GERMAN-AMERICAN ALLIANCE.

BOSTON, MASS., *February 26, 1912.*

ADOLPH TIMM, Esq.,
Philadelphia, Pa.

DEAR SIR: The German-American Alliance of Boston and Vicinity authorize you to protest in their name at any hearing or hearings to be held by any committee of both Houses of Congress sitting at Washington having the below-mentioned bills in charge, or to enter our protest in any other way which may seem to you wise.

We protest vigorously against the enactment of the following bills and resolves: Sixty-second Congress, second session, S. 4043; Sixty-second Congress, first session, H. R. 6293.

As citizens we object to any legislation which confiscates or tends to confiscate or curtail any right to live and to act as freemen. We recognize fully the need of proper and sane regulation of the liquor traffic and liquor production, but we object most emphatically to total prohibition or any undue restriction of the right to buy liquor and to consume it.

It seems to us the height of absurdity to attempt such repressive measures as are set forth in the pending legislation. It has been recognized by all intelligent citizens that any measure which lays an embargo on honest and dishonest conduct alike leads to evasion of the laws and creates greater evils than it corrects.

We are and always shall be ready to support measures which will help to remedy or abolish the abuse of liquor and the consequences of such abuse, but we urge that the attempted legislation would restrict the rights of temperate, law-abiding citizens and would create vastly greater evils by evasion, and the slinking criminal carrying on of the trade aimed at in defiance of all law whatever, moral or otherwise.

Yours. very truly,

WILLIAM J. E. SANDER,
For German-American Alliance of Boston and Vicinity.

ARGUMENT OF MR. LAWRENCE MAXWELL ON BEHALF OF THE NATIONAL WHOLESALE LIQUOR DEALERS' ASSOCIATION.

Senator NELSON. Mr. Maxwell, you may proceed whenever you are ready.

Mr. MAXWELL. Mr. Chairman and Senators, I understand that you have for consideration this morning Senate bill 4043, proposed by Senator Kenyon.

The bill reads as follows:

[S. 4043, Sixty-second Congress, second session.]

IN THE SENATE OF THE UNITED STATES.

DECEMBER 21, 1911.

Mr. Kenyon introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL To prohibit interstate commerce in intoxicating liquors in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, including beer, ale, or wine, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited; and any and all contracts pertaining to such transactions are hereby declared to be null and void, and no suit or action shall be maintained in any court of the United States upon any such contract or contracts, or for the enforcement or protection of any alleged right based upon or growing out of such contract or contracts, or for the protection in any manner whatsoever of such prohibited transactions.

SEC. 2. That there shall be no property right in or to any such liquor while in the possession of any railway company, express company, or other common carrier in connection with any shipment or transportation thereof in violation of this act.

In other words, this bill forbids the shipment or transportation in interstate or foreign commerce of any spirituous liquor, wine, ale, or beer, which is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of the State to which the article is destined, enacted in the exercise of the police powers of that State. The bill proposes to make null and void any and all contracts pertaining to such transactions, and to prohibit the enforcement or protection of any alleged right based upon or growing out of the contract in any courts of the United States. I have been invited to discuss before the committee the constitutionality of this proposed bill, and I shall confine myself entirely to the question of its constitutionality and endeavor to present such arguments as I would present to the Supreme Court of the United States if the bill were enacted into law and were before that court for decision. My claim is that this bill is unconstitutional because it is in violation of the interstate-commerce clause of the Constitution; in that it undertakes to delegate to the States the power to regulate interstate commerce in a recognized article of commerce, in the fundamental aspect of interstate commerce, and not merely incidentally.

We claim further that the bill is unconstitutional, because it is in violation of the fifth amendment of the Constitution, which forbids

any law depriving any person of life, liberty, or property without due process of law; in that it undertakes to invalidate a contract on account of the intention of one of the parties to the contract, although the other may be entirely innocent.

Senator RAYNER. What was that you said about the fifth amendment? I did not catch that, exactly.

Mr. MAXWELL. I said we claim that the act is unconstitutional not only because it undertakes to delegate to the States the power to regulate interstate commerce, but also on the ground that it undertakes to invalidate a contract where the intention of one of the parties to the contract is to do an illegal thing, although the other party is entirely innocent.

Senator BACON. Do you mean by that that the law will permit the State to invalidate the contract?

Mr. MAXWELL. No, sir; I mean by that that this act of Congress itself undertakes to invalidate a contract and to destroy all right of property under that contract, which is necessarily between two or more parties, when it appears that only one of the parties to that transaction has the intent to violate some law. We submit that it is not within the power of Congress or of any legislative body in a free government, acting under constitutional limitations, to take away from a man his property or his rights under a contract because one of the parties to that contract intends to violate the law, although the other is entirely innocent and has no illegal intent.

Senator RAYNER. You consider the words, "Due process of law," as equivalent to the words, "Obligation of contract"?

Mr. MAXWELL. Yes, sir.

Senator RAYNER. Have you any decisions on that?

Mr. MAXWELL. Yes; there are some decisions. If it will be convenient to the committee I would like to discuss now the first constitutional objection to this bill, which is that it undertakes to delegate to the States the power to regulate interstate commerce. What is the bill in that respect? Of course it is a bill to regulate interstate commerce. It undertakes to regulate interstate commerce by prohibiting interstate commerce in intoxicating liquors, in certain cases. That is the title of the bill. What are the cases? The cases depend entirely upon the law of the State and not upon any act of Congress. This bill by itself regulates nothing. It has no vitality or effect whatever in the absence of a law of the State. It becomes effective only when the law of some State undertakes to prohibit interstate commerce. If that law of the State is repealed, the regulation is gone. If the law of the State is amended, the regulation is amended. If the law of the State is reenacted, the regulation again comes into force and effect.

The regulation which this bill contemplates is not a regulation which Congress determines to be a wise or proper regulation of interstate commerce. It is whatever regulation any State, from time to time, may adopt in the exercise of any police power of that State. In other words, Congress does not say by this bill: We prohibit the transportation of intoxicating liquor absolutely, or under this, that, or the other circumstances, in pursuance of a public policy, which commends itself to Congress. All that Congress does by this bill is to say, The Nation has no policy on this subject. The Nation is

not proposing to prohibit the transportation of intoxicating liquors in interstate commerce or to declare when, according to the policy of the Nation, such transportation shall be permitted and what rules and regulations. This bill leaves the whole thing to the States. In the absence of legislation by the States there is no regulation under this bill. The regulation is in this State whatever, for the moment, is the law of that State; in the other State it is whatever, for the time being, is its law and policy. It changes with the repeal of the law of the State; it changes with the modification of the law of the State. The regulation is as various as the laws of the States enacted from time to time may make it. In other words, this bill is nothing in the world but a statement by Congress that it does not regulate interstate commerce by any rule which it prescribes, but it leaves the whole subject to be regulated by the varying laws of the States enacted from time to time, amended from time to time, repealed from time to time, reenacted from time to time in the exercise of any police powers of the States.

The same bill was for hearing before the Judiciary Committee of the House, and at the hearing of January 30, last, this essential feature of the bill was aptly disclosed in the following statement made by Mr. Dinwiddie, who was urging the adoption of the bill before that committee. The bill in the House had been proposed by Representative Webb. Mr. Dinwiddie said:

The beauty about this law, as Mr. Webb expressed it to me the other day, is that it expands or contracts with the legislation of the States.

That is the purpose of this bill. That is the beauty of the law. That is the only object of the law. It not only expands or contracts with the legislation of the States, it comes into being with the legislation of the States. It disappears with the legislation of the States. And between its appearance and disappearance it expands and contracts with the legislation of the States enacted in the exercise of any police powers of the States.

Senator BORAH. Mr. Maxwell, suppose that Congress should see fit to say that no liquor should be shipped into the State of Kansas, selecting that State for itself and saying that no liquor should be shipped into it; do you not think it could do so?

Mr. MAXWELL. That would not raise the objection I am making.

Senator BORAH. If it could do that, would it not join the legislation of the State to the legislation of Congress as a part of the regulation of Congress and adopt it?

Mr. MAXWELL. No. If Congress may, in its power to regulate interstate commerce, enact a law which forbids the shipment of an article of commerce such as wine, ale, beer, or spirits into the State of Kansas alone, then that is a declaration of the policy of Congress. It leaves nothing to the State. The regulation is declared by Congress. Nothing is left to the State of Kansas. But if Congress says that the transportation of liquor into the State of Kansas is forbidden if the State of Kansas so declares, then there is no regulation, except as the Legislature of the State of Kansas may impose a regulation. The difference is between a regulation imposed by Congress in the declaration of a national policy and a regulation which is left entirely to the action of the State.

In the hearing before the House committee the decision of the Supreme Court in the lottery case, *Champion v. Ames* (188 U. S., 321), was cited. What did the lottery case decide? The Supreme Court had before it a statute of the United States which forbids the transportation of lottery tickets in interstate commerce. Nothing was left to the States. That statute did not say "Lottery tickets shall not be carried into any State which forbids their use, or from any State which forbids their use, or transportation." Congress did not leave, by that statute, anything to the States. There was an absolute rule declared by Congress which went into force and effect when Congress passed the statute. It could not be repealed or modified by any act of the States. It did not expand or contract with the legislation of the States.

Senator BACON. The earlier decision that you refer to arose out of the legislation of a New England State. It recognized the fact that in the absence of legislation by Congress the varying powers would exist in the States, did it not?

Mr. MAXWELL. That is true.

Senator BACON. There is no doubt about that principle having been recognized by the Supreme Court in those cases. The real question is how far subsequent decisions have qualified or controlled that principle.

Mr. MAXWELL. I suppose the reference is to the license cases?

Senator BACON. Yes.

Mr. MAXWELL. Where the Supreme Court of the United States in 5 Howard, 504, recognized the validity of an act of New Hampshire?

Senator BACON. In other words, deciding that the State had the right to control those matters in the absence of legislation by Congress?

Mr. MAXWELL. Yes.

Senator BACON. But subsequent legislation was to the effect that States would require legislation by Congress before they would be permitted to do it, as I understand.

Mr. MAXWELL. Yes. It was the view of the Supreme Court for a long time that in respect of interstate commerce the States might act in the absence of any legislation by Congress. That was the principle recognized in the license cases (5 How., 504) to which reference has just been had.

The statute of New Hampshire in that case was recognized by the Supreme Court as being a regulation of interstate commerce, as it undoubtedly was, and the Supreme Court said that that was not forbidden, because under the Constitution the States were at liberty to regulate interstate commerce in the absence of regulation by Congress. But that doctrine has been repudiated.

Senator BACON. That is the point I am after. I say I think the real question is how far the subsequent decisions have controlled that formal enunciation, or, rather, varied it, modified it, qualified it, or absolutely negated it.

Mr. MAXWELL. They have absolutely repudiated that doctrine.

Senator BACON. I think you do not catch my point. I think the real question is how far, in denying the principle enunciated in those cases, Congress has since gone in recognizing the right of the States where there has been authorization by Congress.

Mr. MAXWELL. They have gone this far: In the first place, the Supreme Court have recalled altogether the rule recognized in the license cases, that it is competent for the State to regulate interstate commerce in the absence of regulation by Congress, and they have established the rule that the absence of regulation by Congress means that there shall be no regulation. That principle was forcibly brought to the attention of the country by the decision of the Supreme Court in the Wabash Railway case, reported in 118 United States, 557, where the validity of a rate prescribed by the Legislature of Illinois was before the court. It was a rate that affected interstate shipments, and the court held, some of the justices dissenting, that the failure of Congress to prescribe rates did not give the States the right to fix them, and that absence of legislation on that subject conferred no power upon the State to prescribe rates for interstate shipments; in other words, that the absence of legislation by Congress meant that there should be no legislation or rule at all upon the subject.

Senator RAYNER. Before you go further, just let me ask you a few questions. It will help along a good deal. You made an admission just now, and I wanted to ask you whether it did not go a little far, in answer to the question from the Senator from Idaho. Is there any case which holds—the lottery case does not hold—that you have a right to deal with one State; that, under the clause to regulate commerce, Congress has a right to pass a law prohibiting the transportation into any one State?

Mr. MAXWELL. No.

Senator RAYNER. For instance, take the case of Kansas. Is there any decision that has gone as far as that?

Mr. MAXWELL. No, sir.

Senator RAYNER. I thought you said just now that you had no doubt we could prohibit the transportation of an article of commerce into Kansas or Arkansas, or whatever State it was, alone.

Mr. MAXWELL. I did not mean to make any such statement.

Senator RAYNER. I thought so.

Mr. MAXWELL. I intended to say that the question whether Congress could, in the exercise of its power, say that liquor should not be transported into Kansas was not the question before this committee, because such a law would leave nothing to the State of Kansas. It would not be a delegation of any power whatever to the State of Kansas. The regulation would be a regulation declared by Congress, coming into force the minute the statute was passed, remaining in force as long as the statute was in existence; whereas the bill which is now before the committee is one which imposes no regulation whatever except such regulations as the States may from time to time declare. The authority of the State to regulate interstate commerce was up for great discussion and consideration in the cases in the Supreme Court of the United States arising out of the Wilson Act.

In the case of *Bowman v. The Railway Co.* (125 U. S., 465), decided in 1888, the court held that a statute of Iowa, prohibiting the importation of intoxicating liquors into that State, was invalid in so far as it undertook to affect interstate shipments. That was a suit brought by Bowman against the railway company for damages. In the State of Illinois he tendered to the railway company a shipment of intoxicating liquor to be carried to Iowa. In Illinois the transac-

tion was valid. The railway company refused to receive the liquor for carriage to Iowa on the ground that the law of Iowa forbade, and the question was whether that was a good defense for the railway company. The Supreme Court of the United States decided that the law of Iowa was inoperative, because the transportation of an article of commerce between two States can not be controlled by the law of any State. Mr. Justice Matthews, delivering the opinion, said: "How can it be? If the law of Illinois permits and the law of Iowa forbids, what law shall the carrier follow?"

Senator NELSON. But, Mr. Maxwell, the decision in that case did not go to the power of Congress—as to what Congress could do.

Mr. MAXWELL. No; and I am not now challenging the power of Congress to say that some article of commerce shall not be shipped to Kansas or to Texas. That is not the question here, since such a law would leave nothing to those States. It would be a rule prescribed by Congress, and by Congress alone, not dependent on the legislation of any State.

Senator NELSON. I do not want to interrupt you if it does not suit you, but I want to call your attention to one thing. This discussion is for information. My understanding is that the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes is all in one paragraph of the Constitution, and rests on the same foundation. In the case of *Buttfield v. Stranahan*, the Tea case (192 U. S., 470), the Supreme Court said that Congress had the absolute power to prohibit the importation of goods from foreign countries. You object on the ground that this is a fluctuating rule.

We have such a rule in our tariff regulations in the maximum and minimum tariff. Whether goods shall be imported from a foreign country at one rate or another depends upon the action of that country. It depends upon the action of that country toward us. In the one case they would come in at the maximum tariff, and in the other they would come in at the minimum tariff. So that that is on all fours with the objection you make, that this law is dependent upon the laws of the States.

Mr. MAXWELL. The prohibition of the importation of foreign goods, or of the coming into the United States of foreign subjects, rests upon an entirely different ground than the regulation of commerce among the States.

The question here is whether Congress can declare a rule which does not come into existence at all unless the State says that the transportation shall be forbidden, which comes into existence only to the extent that the State undertakes to forbid, which passes away when the State says that there shall be no regulation; and the regulation is in respect of interstate commerce in its fundamental and essential aspect.

In the case of *Bowman v. The Railway Co.*, what the court decided was that the law of Iowa could have no effect whatever upon interstate commerce, and the court put the question, "How can it be otherwise? If the State of Iowa by its law can forbid interstate commerce, what is going to become of the statute of Illinois which permits the transaction? Which law shall govern?" You have commercial anarchy. The railroad company says, "By the law of this

State I shall not carry. By the law of the other State I must carry. What law shall I obey"? So that the case was a striking illustration of the commercial anarchy that would result if the regulation of interstate commerce depended upon any rule except that prescribed by the Congress itself.

Senator RAYNER. The Senator from Minnesota asked you a question, whether the case was not analogous of the minimum and maximum tariff, and if we had the right to adjust our law according to the regulations of foreign countries, we certainly would have a right to regulate it according to the regulations of the States. I want to call your attention to the fact that the levying of a maximum and minimum tariff does not come under the clause of the Constitution to regulate commerce at all, but under the clause to lay duties, which is an entirely different thing.

Mr. MAXWELL. Which is an entirely different thing. Now, to follow the decisions of the Supreme Court. Then came the case of *Leisy v. Hardin* (135 U. S., 100), which was decided in April, 1890. In that case the Supreme Court of the United States held that interstate commerce gave the right to the person engaged in it not only to transport the article into a State, but to sell it there in the original package; that the right to sell after being received into the State was an incident of interstate commerce which no State could deprive the party of. Thereupon Congress, the following August, passed the Wilson bill. I understand that the bill was introduced into the House a few days after the decision in *Leisy v. Hardin*, and was shortly thereafter adopted by the House, and became a law by the action of the House and Senate and the approval of the President, in the following August.

That law provided that intoxicating liquor shipped in interstate commerce should be subject to the police power of the State upon its arrival in the State, and in the case of *In re Rahrer* (140 U. S., 545), decided in 1891, the Supreme Court held that the law was constitutional. That was a case in which Rahrer was convicted under the law of the State of Iowa for selling a package of intoxicating liquor received by him in that State as the result of an interstate transaction, and which was sold by him in the original package after it had been delivered to him. The Supreme Court decided that it was competent for the States, in view of the Wilson Act, to exercise their powers to the fullest extent over the commodity after it had become a part of the mass of property in the State by having been received by the consignee.

Then came the case of *Rhodes v. Iowa* (170 U. S., 412).

Senator BACON. Is not that the principle which is recognized, not only in that case, but in subsequent cases, that Congress could authorize a State in the exercise of its police powers to interfere to the extent that Congress might specify?

Mr. MAXWELL. After the essentially interstate transaction had ended. The limitation which the Senator's question suggests was brought before the courts for determination and consideration in the case of *Rhodes v. Iowa* (170 U. S., 412), decided in 1898. That was a case where, under the law of the State of Iowa, the liquor was seized while it was in the possession of the railway company and before it had been delivered to the consignee; and the question was

whether that was a valid seizure. It was claimed that the Wilson Act undertook to remove any impediment to the exercise of the police power of the State as soon as the package arrived in the State, and it was contended that that meant as soon as it crossed the State line.

The Supreme Court held that the law of the State, under the Wilson Act, could not be operative until the package had been delivered to the consignee; in other words, until the interstate commerce transaction had been completely ended, and that the interstate commerce transaction involved the shipment of the goods from the other State, their carriage into Iowa, and their delivery to the consignee in Iowa, and that it was not within the power of the State of Iowa, under the Wilson Act, to exert any authority over that transaction or that commodity until after the interstate commerce transaction had been completely ended by the delivery of the goods to the consignee, the goods thereby, for the first time, becoming subject to the law of the State, by being a part of the mass of the property of the State.

Senator NELSON. My recollection of that case, Mr. Maxwell, is that the Supreme Court held that the goods, under the Wilson law, were not deemed to have arrived in the State until they had been delivered to the consignee.

Mr. MAXWELL. Yes, they did.

Senator NELSON. That was all.

Senator BACON. The question I want to address to you is this. That case was a construction of the Wilson law. Do you understand it to be a construction as to the power of Congress?

Mr. MAXWELL. No; it involves in itself only a construction of the Wilson bill.

Senator BACON. Yes; that is true.

Mr. MAXWELL. But the Supreme Court construed the Wilson bill so as to make it constitutional. The Wilson bill said that the goods should be subject to the police power of the State upon arrival in the State, and it was generally supposed that that meant what it said, upon arrival in the State, as soon as it crossed the State line. The Supreme Court construed that language to mean upon delivery to the consignee, and they so construed the statute in order to make it a valid statute.

Senator RAYNER. You know, of course, that we went over this bill two or three years ago.

Mr. MAXWELL. Yes.

Senator RAYNER. The very point you are now discussing, the point of Federal decisions, was covered then. This bill is a somewhat different bill from that. It seems to me it involves different principles. We had different grounds on that. Some of us were opposed to it and some of us favored it. I do not know, Mr. Chairman, whether that bill was reported to the Senate or not. Do you remember, Senator Bacon, whether it was or not? I know the subcommittee divided on it.

Senator BACON. Yes.

Senator NELSON. The majority of the committee were against it. It was not reported.

Senator BACON. The bill he refers to was amended by the Senate, and it was referred to the Judiciary Committee and came through that way.

Senator BORAH. I suggest, Mr. Chairman, that Mr. Maxwell ought to be permitted to continue his argument in a connected way.

Senator RAYNER. Well, you interrupted him, too.

Senator BORAH. We have not been discussing other bills.

Mr. GANS. Here is that report that has been referred to.

Senator RAYNER. I do not think an interruption delays proceedings. I think it hastens them.

Mr. MAXWELL. It does not trouble me at all. So far as I, personally, am concerned, I am pleased to be interrupted.

Senator RAYNER. I will not interrupt any further.

Mr. MAXWELL. I do not mind it at all.

Senator RAYNER. We all want to get light on this.

Senator BORAH. Yes, but when a man is making a connected statement, I think he should be allowed to complete it.

Senator RAYNER. What I said was right on this subject. All I was going to say was that this bill raised an entirely new question, a different question from that raised by that bill.

Mr. MAXWELL. I wanted to say, in answer to the suggestion of the honorable Senator, that this bill is subject to all of the objections that rendered the other bill unconstitutional, and to several in addition.

Senator RAYNER. That would not make us say that it is unconstitutional.

Mr. MAXWELL. No; but if we are discussing the unconstitutionality of this bill, why shift to the question whether some other bill was constitutional? What the Senate did in respect to the bill that has just been referred to is this: It reported that the bill was unconstitutional, but it recommended other legislation, which was passed, whereby all the power of Congress vested in it by the Constitution was exerted to its fullest extent. The claim was made by the proponents of legislation, such as this, that the police powers of the State were interfered with, because carriers carried liquor into the State and, in effect, sold it there, and that express companies received liquor C. O. D., and that what they in effect and fact did was to keep the liquor at their station in the State until somebody would come along and pay the price of it.

Congress said, "We will prevent that. We have a right to regulate interstate commerce in intoxicating liquor by forbidding C. O. D. shipments." And you did that. You said, "We will help you further; we will require a shipper to mark on the package that it is liquor, and the amount of liquor, and the name of the consignee, and we will forbid the delivery of that package to any person other than the bona fide consignee." That Congress did in the exercise of its undoubted power to regulate interstate commerce, and it did it by prescribing a rule of Congress. Nothing was referred to the States. The report of the committee of the Senate at that time was that those regulations, which are now a part of the Criminal Code of the United States, being sections 238, 239, and 240, went to the limit of the authority of Congress in the regulation of interstate traffic in intoxicating liquors.

Senator DILLINGHAM. And was that applicable in every State of the Union; was it made universal?

Mr. MAXWELL. That was made applicable in every State in the Union, to every carrier, to every person in the Union. It was an

absolute rule prescribed by act of Congress. Nothing was left to any State, at all. Of course, such legislation as that is not subject to the objection that I urge here against the bill now under consideration.

Now, to come back to the course of my argument. In the case of *Rhodes v. Iowa* the question was whether the words in the Wilson Act, "upon arrival in the State," meant upon arrival in the State or upon delivery to the consignee.

The Supreme Court of the United States construed those words to mean upon delivery to the consignee, evidently for the purpose of saving the statute against the constitutional objection. And here is what Mr. Justice White, delivering the opinion of the court in *Rhodes v. Iowa*, said on that subject. I read from page 424 of 170 United States. He reviewed the prior cases, the *Bowman* case and the case of *Leisy against Hardin*, where the court held that the right to carry the goods in interstate commerce involved the right to sell them in the State in the original package after they got there. The Supreme Court decided that the Wilson Act denied that right to the consignee, and that under the Wilson Act the only right he had was to receive the goods. He had that right; the State could not interfere and seize the goods until they had been delivered to him, but the moment they were delivered to him they became a part of the mass of the property of the State, subject to the police powers of the State. Mr. Justice White said:

Whilst it is true that the right to sell free from State interference interstate commerce merchandise was held in *Leisy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved in interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of State authority should not, without the clearest implication, be held to imply the purpose of subjecting to State laws a contract which in its very object and nature was not susceptible of such regulation, even if the constitutional right to do so existed, as to which no opinion is expressed.

They did not have to express any opinion on the constitutional question. They construed the act so that the constitutional objection did not arise. They construed the words "upon arrival in the State," to mean upon delivery to the consignee, for the very purpose of saving that statute and of making it constitutional. It is the duty of every court to so construe a statute, if possible, that it shall not be unconstitutional.

But the learned justice, speaking for the court, did not hesitate to say that the transportation, including delivery to the consignee, imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, and that any other construction of this statute would imply the purpose of Congress to subject to State laws a contract which in its very essence and nature was not susceptible of such regulation.

Now, that is manifest. Interstate commerce, in its fundamental and essential aspect, means the shipment of the goods, their carriage,

and their delivery to the consignee. That is national. That involves passage over or through two States. It is not possible that that subject can be regulated by State laws, because those laws may be different. The carrier can not, in respect of the receipt of the goods, their carriage, and their delivery, be subject to more than one rule. As the learned justice says, in the nature of things that must be so; that is a national transaction; that is interstate commerce in its fundamental aspect.

But after the goods have been delivered to the consignee, and the interstate transaction in its fundamental and essential character has been ended, then you can leave the rest to the States. While the power to sell in the original package was long regarded as a necessary incident of interstate commerce, it is, as Mr. Justice White pointed out, but an incident. It relates to something that is done in the State after the national power is ended. It is something that ought to be subject to the control of the States. And so the Supreme Court held that that transaction, to wit, the sale of the goods, the use of the goods, the possession of the goods by the consignee, after the interstate transaction has ended, is something that the States may regulate, but that in the nature of things it is impossible to leave to the varying rules of States any regulation between the point of reception by the carrier and delivery by the carrier in another State. That is what this bill seeks to accomplish.

Under the laws of Congress as they exist, and the decisions of the Supreme Court of the United States, the police powers of the States are ample and complete. The police powers of the States may be exerted so as to prevent the sale of intoxicating liquor by the consignee, so as to prevent their possession by him, so as to condemn and destroy them, even, although that question is not involved, to prevent his personal use of them. Congress has done everything that is within its power to regulate an interstate transaction—the essentially national interstate transaction—by requiring the goods to be marked, by preventing C. O. D. shipments, and by preventing their delivery to any other than the bona fide consignee.

What do the proponents of this bill want? The only thing they want is to get a declaration by Congress that the police power of the State may be exerted upon the arrival of the goods in the State, before their delivery to the consignee. That is all this bill seeks to accomplish, and the question is whether it is within the power of Congress to leave to this State, to that State, to the other State, by a rule to be prescribed by it, the making of a regulation which will enable that State to seize or interfere with the commodity while it is still in course of transit, and before it has been delivered to the consignee. Of course, delivery to the consignee may be by delivery to him personally or to his agent, or by being held by the railroad company as his warehouseman. This bill is designed simply to refer the whole subject to the States, to give them control over the interstate commodity before the interstate transaction in its fundamental and essential aspect has been ended, while it is in course of being performed. It delegates the power to the States to control by regulations enacted in the exercise of any police power.

Mr. Justice Matthews in the case of *Bowman* against the railway company had occasion to show to what lengths the police power of a State may be extended. He says (125 U. S., p. 494) :

If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco or any other article the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community.

Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it can not be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States.

So that, if this bill were to become a law, Iowa might say, "We will seize the article in interstate commerce as soon as it crosses the line, before it is delivered to the consignee, because we forbid any man in the State of Iowa to have any liquor in his possession." The police power of that State, if the fourteenth amendment permits, might go that far, and provide, if this bill becomes a law, that there shall be no interstate shipment of intoxicating liquors into Iowa, even to a man for his personal use. The State of South Carolina might say, "We do not object, as a matter of public policy, to our citizens having a drink, but we are going to have a monopoly of the business." Justice Matthews points out that that would be in the exercise of her police power, and so she might say, "We will not let any liquor come into the State of South Carolina, because we want to monopolize the business." The State of Kentucky may say, "We have our own distilleries. We do not propose to have whisky from Cincinnati, or from Peoria, Ill., coming into Kentucky, and so we will establish a police regulation which forbids the importation of liquor from any other State to our State." Mr. Justice Matthews points out that that would be within the police power of the State of Kentucky.

In other words, that police power may be exerted on any ground or for any consideration that the State may choose to put at the bottom of the statute, and not merely for the purpose of declaring a public policy based on considerations growing out of the health, comfort, or peace of the community.

See how various this regulation would be. In Kentucky it might be for one reason, in South Carolina it might be for another, in Iowa for another. A regulation in one State might be, by an act of the legislature, State-wide. In another State it might be by the act of the county, or of the township, or of the residential district, or what not; and what the State law prohibits in any particular case would be something that no man could find out until the Supreme Court of the United States had decided what it meant. What would be the commercial anarchy in interstate commerce if Congress should ever recognize for a minute the power of any State, or undertake to confer upon any State the power, to regulate in its fundamental aspect interstate commerce in an article of commerce according to

whatever rule the State might enact in the exercise of its police power.

It was said in the hearing before the House committee, "This is not a delegation of power by Congress to the States." What is it? Of course, there is no magic in the word "delegation." What is it? It is leaving the rule to be prescribed by the State. It is not establishing a rule which is to be ascertained by the act of Congress. Congress, in effect, says by this bill, "We have no public policy about it at all; whatever the State says, that is the rule." And if you want to find out whether you can carry this article of interstate commerce into the State of Iowa you must find out what the latest rule on that subject is in the State of Iowa. If you want to know whether it can be carried into the State of Ohio—that would depend a good deal upon where you want to carry it—if you want to carry it into the State at large, without any particular place, there is no regulation. If you want to carry it into Cincinnati, that will depend upon whether you want to carry it into Ward A, where the sale of liquor is not prohibited, or whether you want to carry it into the third precinct of Ward B, where it is prohibited. In the matter of interstate commerce, under the Constitution of the United States the intention and purpose of the framers was to have the rule governing interstate commerce, in its essential and fundamental aspects, prescribed by Congress and by Congress alone.

The man who wants to engage in interstate commerce or in foreign commerce—the man in London, in Bordeaux, in Berlin, in Philadelphia—should be required to seek only the rule prescribed by Congress and the Statutes of the United States. Under this bill he could not engage in interstate commerce at all without knowing not only the rule prescribed by the particular State to which the goods were to go, but by the particular ward and precinct into which they were to go.

Senator DILLINGHAM. Take, for illustration, the State of Vermont, which has a local-option law.

Mr. MAXWELL. Yes.

Senator DILLINGHAM. Out of 246 towns, I noticed in the paper a day or two ago that 21 towns voted for license. All the rest are dry towns. What will be the operation of the law there?

Mr. MAXWELL. That would depend entirely upon the town to which the liquor was to go. Whether interstate commerce in intoxicating liquors should be permitted under this bill would depend not upon the opinion of Congress upon the subject, but upon the opinion of the people in this town, that town, and the other town. Now, we are dealing with an acknowledged article of commerce. The Supreme Court said, in the case of *Leisy v. Hardin* (135 U. S., 110):

That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts is not denied.

On the subject of the delegation of power by Congress there are many apt expressions by distinguished justices of the Supreme Court. The power to regulate commerce is vested in Congress; nowhere else. If that power is to be exerted, it must be exerted by Congress; it can not be exerted by any State or any subdivision of a State, and when Congress undertakes, by such a bill as this, to say

it may be exerted by a State, by any law of a State enacted in the exercise of its police power, that is in effect undertaking to delegate the power to regulate interstate commerce to the State.

Congress can no more delegate that power which the people gave to it to exert, itself, than it could delegate the power to coin money or any other power which is exclusively in Congress. In the license cases Chief Justice Taney said (5 How., 580) :

If the grant of power to the United States to make regulations of commerce is a prohibition to the States to make any regulation upon the subject, Congress could no more restore to the States the power of which it was thus deprived than it could authorize them to coin money.

In the case of *Cooley v. The Board of Wardens* (12 How., 299) Mr. Justice Curtis had occasion to consider this delegation of power, in respect of interstate commerce, by Congress to the States. That was a case in which a State had made a regulation which required the acceptance of a pilot and the payment of a pilotage fee by vessels engaged in interstate commerce within the waters of the State. The court finally decided that that was really a matter of local concern, although it indirectly affected interstate commerce; that pilotage within the harbors of a State was a local concern.

But Mr. Justice Curtis, in his own luminous and forcible way, had this to say on the subject of delegating power (12 How., 317) :

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid. The act of Congress of the 7th of August, 1789, section 4, is as follows :

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

That was a clear case, therefore, of Congress undertaking to leave to the State the enactment of laws affecting pilotage in their waters. The learned justice continued :

If the law of Pennsylvania now in question had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress and thus made a law of the United States, and so valid, because this act does, in effect, give the force of an act of Congress to the then existing State laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803.

He is referring to the law of Pennsylvania.

What effect, then, can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity with such laws as the States may respectively hereafter enact for the purpose until further legislative provisions shall be made by Congress?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress can not regrant or in any manner reconvey to the States that power. And yet this act of 1879 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate, for only a rule created by the sovereign power of a State acting in its legislative capacity can be deemed a law enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it can not, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question whether the grant of the commercial power to Congress did per se deprive the States of all power to regulate pilots.

The court held that it did not, because that was a mere incident of interstate commerce. But on the main question he continued, at page 321:

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the executive power of the General Government and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws and adopt them as its own acts; and how are the legislatures of the States to proceed in future to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they can not legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

The decision in that case was that the regulation of pilots, though it effected interstate commerce, was not a portion of commerce which was essentially national in character so as to require exclusive regulation by Congress; and that in the absence of action by Congress the State legislation was valid.

But as to commerce in its fundamental aspect, Congress can neither delegate to the States the power to regulate nor adopt as its own a State law dealing with a subject which the States can not legislate on.

Senator NELSON. My understanding, Mr. Maxwell—and you will excuse me for interrupting you—is that these local pilotage laws are recognized as such, and they vary in the different localities throughout the country.

Mr. MAXWELL. Yes.

Senator NELSON. And the Supreme Court has held them good until Congress acts?

Mr. MAXWELL. Yes.

Senator NELSON. That is my understanding.

Mr. MAXWELL. That is because, while they affect interstate commerce, they affect it only incidentally.

Senator BORAH. And locally?

Mr. MAXWELL. And locally. It is really a matter of local concern. But the Supreme Court says that you can not interfere with an interstate shipment while it is in course of transit and prior to delivery to the consignee without interfering with interstate commerce in its essential and fundamental aspect; that is so, in the nature of things.

Senator NELSON. The question back of it, Mr. Maxwell, and that is what I would like to hear you upon, is as to the constitutional power of Congress to pass such legislation.

Mr. MAXWELL. I have been trying to address myself to that question, Mr. Chairman, not by denying the power of Congress to pass any rule which Congress prescribes, but by denying the power of Congress to refer the matter to the States, saying, "Any rule that you pass at any time in the future, in the exercise of your police power, shall be the rule." My objection is the fundamental objection that this act is no regulation by Congress; that it is merely an attempt by Congress to refer the matter to the various States and let them prescribe any rule they choose in the exercise of any police power that they have. That is the objection to this bill. That is the fundamental objection to this bill; that is the ground upon which we urge before this committee that the bill is unconstitutional.

Before the House committee it was said, "Why, Congress in other cases has made the rule dependent upon the rule of the State," and they referred to section 289 of the Criminal Code, which was a

statute adopting the laws of the States for punishing wrongful acts upon territory within the States, subject to the jurisdiction of the States. What did Congress do there? Did they say, "Whatever statutes the State may pass at any time in the future shall be the law in force in that State?" Not a bit of it. They said, in respect of territory within the State which is subject to the jurisdiction of the State, such as national homes, post offices, and the like:

We hereby adopt the laws of the States now in force, and every such State, Territory, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.

Senator NELSON. Let me call your attention to a familiar case—that is, under the bankruptcy law. Under that law, under the exemption laws, exemption from execution in the different States prevails.

Mr. MAXWELL. Yes.

Senator NELSON. That is, there is one rule in Minnesota, another in Ohio, and so on, according to the several States; but my impression is, although I am not certain about it, that that same rule applies to the collection of judgments in Federal courts. I think I am right about that.

Mr. MAXWELL. Yes; and with respect to the procedure in the Federal courts in actions at common law. It is provided that it must conform as nearly as may be to the laws of the State. Those are all subjects upon which it is quite competent for—

Senator NELSON. But, of course, those do not relate to interstate commerce.

Mr. MAXWELL. No. The fundamental proposition is that the power to regulate commerce in its fundamental and essential aspect, which involves delivery of the goods to the consignee, is in Congress. It is nowhere else. The Constitution put it in Congress. It put it in Congress for the purpose of preventing commercial anarchy, for the purpose of having one rule—the rule of the Nation—and Congress can not permit any State to pass any law or enforce any regulation which interferes with that interstate transaction. Congress can not do it by leaving it to the State. Congress can not do it by an act saying, "Whatever rule you adopt is our rule, for the time being." That is the fundamental objection, if the committee please, to this statute.

Section 289 of the Criminal Code of the United States you will see is not open to that objection. All that Congress did by that statute was to say "We hereby adopt"—in other words "enact"—"for the territory within a State which is subject to our jurisdiction, the existing laws of that State, and they shall remain laws of Congress, notwithstanding any repeal thereof by the State." Nothing is left to the State.

Congress simply enacts those laws, makes them its own by this statute, and expressly provides that no modification, repeal, or amendment of the laws by the State shall in anywise affect their existence as laws of the United States.

On this subject in the House they referred us to the section of the statute relating to obscene books. There Congress provided that obscene books and pictures should not be carried in the mails or in interstate commerce. Congress did not leave anything to the States.

It did not say, "You shall not carry obscene books into any State whose law forbids their introduction or use, or from any State which prohibits their manufacture, sale, or use."

What Congress did there was to establish its own rule, delegating nothing to the States, leaving nothing to the States; whereas in this bill Congress does nothing. It must be conceded that this bill in and of itself does nothing, and that it becomes effective only by virtue of a law of the State already passed or enacted in the future, repealed as the State may see fit, amended as the State may see fit. In other words, this bill, if the committee please, is, and is simply and only, a delegation by Congress of the power to regulate interstate commerce in liquors, wine, ale, or beer to the States.

The law on this subject of interstate commerce on intoxicating liquors has been stated with great clearness by the Supreme Court of the United States in the case of the *Louisville & Nashville Railroad Co. v. The Cooke Brewing Co.*, decided on January 22, last. That was a case in which the railroad company refused to carry beer from Indiana into a dry county in Kentucky, setting up in defense that the law of Kentucky forbade the transportation of beer into that county.

The Supreme Court of the United States said that was no defense. It held that the State of Kentucky can regulate the intrastate transportation of intoxicating liquors, but it can not pass any law that may in the slightest degree affect the duty of a common carrier in respect of the transportation of beer from Indiana into any part of the State of Kentucky. Mr. Justice Lurton said:

By a long line of decisions, beginning even prior to *Leisy v. Hardin* (135 U. S., 100), it has been indisputably determined:

(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

(b) That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another.

(c) That until such transportation is concluded by delivery to the consignee such commodities do not become subject to State regulation, restraining their sale or disposition.

The Wilson Act, which subjects such liquors to State regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are *Rhodes v. Iowa* (170 U. S., 412); *Vance v. Vandercook Co.* (170 U. S., 438); *Heyman v. Southern Railway* (203 U. S., 270); *Adams Express Co. v. Kentucky* (214 U. S., 218).

Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases above cited, reached the same conclusion. (*C. & N. O. Ry. v. Kentucky*, 126 Ky., 563.)

The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other States any commodity which is an ordinary subject of interstate commerce, and such transportation could not be prohibited by any law of the State of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the State.

There is another statute of the United States that was referred to in the hearings before the House committee, to wit, section 242 of the Criminal Code, being the Lacey Act of 1900; and it was said

by the proponents of this bill that the Lacey Act is an instance of the delegation by Congress to the State of the power to regulate interstate commerce. I said to that committee what I think I am entitled to repeat here: "What is the use of passing from the discussion of the validity of this bill to the discussion of the validity of some other law?" Of course, if the Supreme Court of the United States had decided that the Lacey Act was constitutional it would be quite proper to point out the supposed analogy between that act and this act, or the difference between that act and this act; but this Lacey statute has not been declared to be constitutional by the Supreme Court. There are two cases in which it was before the courts on demurrers to indictments under the statute, and in each case the demurrer was sustained and the indictment dismissed on the ground that the indictment was not sufficient. In one of those cases the question of the validity of the statute was suggested. That was in the case of the *United States v. Smith*, in 115 Federal Reporter, page 423.

After announcing that the indictment was bad and the demurrer should be sustained, Judge Archbald said:

According to the views so expressed, I am therefore clearly of opinion that no evasion or violation of the act is disclosed in the indictment, and the demurrer must be sustained. The larger question, whether the act is a legitimate exercise of the power given to Congress by the Constitution to legislate with respect to interstate commerce, or is merely, as charged, a national game law, thinly disguised, which it had no authority to pass, although fully discussed at the argument, I do not feel called upon to decide.

But the Lacey statute might well be constitutional without in the slightest degree affecting the question whether the Kenyon bill is valid.

Senator DILLINGHAM. Just what was that statute?

Mr. MAXWELL. That was with reference to the transportation of game. It is section 242 of the Criminal Code of the United States, and reads:

It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States, to any other State, Territory, or District therefore, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped in violation of the laws of the State, Territory, or District in which the same were killed, or from which they were shipped: *Provided*, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is prohibited by the law in the State, Territory, or District in which the same are captured or killed.

In other words, the Lacey Act forbids the transportation in interstate commerce of the dead bodies of any wild birds or animals which have been killed in violation of the law of the State in which they are killed, or which are offered for shipment in violation of the law of that State. Well, now, wild animals or birds are *feræ naturæ*. They are capable of becoming property only by consent of the State in which they are. They are the property of the State. The State has complete power to say that no man shall have any property right in any wild animal or bird in that State, or that he shall have only a qualified property right. He may have a right to kill it during a certain season, and yet not be given the right, in any season, to ship it out of the State.

The power of the State in respect to animals *ferae naturae* is complete and perfect. The State can allow them to become property; it can allow such modified and qualified property rights in them as it sees fit. It is the owner, and no man can acquire any property in wild animals or birds except subject to the consent of the State. In other words, if the committee please, they are property only when and to the extent to which the State allows them to be such. They are articles of commerce only when and to the extent to which the State makes them articles of commerce. Therefore Congress says, by the Lacey Act, that what is not an article of commerce, what is not the subject of private property, shall not be carried in interstate commerce. And what is an article of commerce in respect of wild animals and birds, *ferae naturae*, can only be determined by the law of the State.

SENATOR NELSON. But, Mr. Maxwell, if birds and game are killed in season, are they not articles of commerce? Are they not the property of the man who shoots and kills them and reduces them into possession?

MR. MAXWELL. That depends entirely upon the law of the State. For instance, the Supreme Court of the United States had that very question before it in the case of *Geer v. Connecticut* (161 U. S., 519). Under a statute of Connecticut the killing of certain wild birds between certain seasons was prohibited, and the statute further provided:

No person shall transport or have in possession, with intent to procure the transportation beyond said State, any of such birds killed within the State.

It did not make any difference whether they had been killed in season or out of season. Geer was convicted in the State of Connecticut of an offense, and he carried his case to the Supreme Court of the United States on the ground that the statute of Connecticut was in violation of the interstate-commerce clause of the Constitution. He was convicted, not of the offense of killing birds in violation of the law of the State, but of having in his possession birds, which had been lawfully killed, for the purpose of transporting them out of the State; so that the case presented the very question which the honorable chairman of the committee has suggested. The Supreme Court upheld the law. The opinion was written by Mr. Justice White. He examined the subject from the laws of Solon down through the laws of Rome, of Austria, of France, of Germany, of England, of the Colonies, down to the law of Connecticut, and he pointed out that by all law of every organized society, from the days of Solon, animals *feræ naturæ* belonged to the sovereign and that no man could get a right of property in those animals without the consent of the sovereign; that that right, which was recognized in Greece and in Rome and by the civil law and by the common law of England, was the right which passed to the Colonies and thence to the States when they were formed, and therefore was in the State of Connecticut. The court said:

That is an absolute right. The State, having absolute ownership and dominion over those wild animals and birds, may altogether prevent their being taken, may allow them to be taken in certain seasons, may allow you to take them provided you keep them in the State; and therefore if the State of Connecticut said to Mr. Geer, "You may kill this bird between certain seasons,"—and he did—"but you shall not take it out of the State," the State of Connecticut was exercising a lawful authority and power.

In other words, the Supreme Court held that the right of property in wild animals or birds existed only when, and to the extent to which, the law of the State permitted it. Mr. Justice Field and Mr. Justice Harlan dissented. They conceded that the right to kill the birds and make them property was within the power of the State, but were of opinion that Connecticut having allowed the birds to be killed, and being lawfully killed, that they were Geer's property; and, being his property, he had a right to do what he pleased with them and to send them out of the State. Therefore, the dissenting justices said: "This law is repugnant to the interstate commerce clause of the Constitution."

The court answered, "The power of the State is so complete over that subject that she may give any qualified right of property she pleases." Now, Connecticut says that you have a right of property in them so long as you keep them in the State. Your right of property does not extend to taking them out of the State. In other words, the Supreme Court held that wild animals and birds are not the subject of property, are not articles of commerce, State or interstate, if the State in which they are says that they shall not be.

All that Congress did by this game law was to prohibit the transportation in interstate commerce of an article which, by the law of the State, acting within its complete and lawful jurisdiction, was denied the attributes of property. In other words, Congress said, "Whatever is not an article of commerce, whatever is not property, shall not be carried in interstate commerce." The gentlemen say, "Oh, well, but you have to go to the law of that State to see whether it is property." Of course you have to. There is no other law that could make it property. The State is the only authority that can make it property or deny it the right of property. It is the only authority that can make it an article of commerce or deprive it of the qualities of an article of commerce. Therefore, you must go to the law of that State. The carrier knows when the articles are offered to it for transportation (when the interstate transaction begins, it knows), they being wild animals or game, that they are not articles of commerce unless they are made such by the law of the State in which they were killed. The committee will doubtless hear a great deal about this game law, and when I made this short, and as I think simple, answer to the suggestion before the Judiciary Committee of the House one of the learned members of that committee said that there was no such law; that wild animals or game were as much subjects of commerce, or the subject of property, as anything else, I beg to refer him to this decision of the Supreme Court of the United States in the case of *Geer v. Connecticut*, which was reaffirmed in the case of *Seltz v. Hesterberg* (211 U. S., 31), decided in 1908.

So much, if the committee please, in support of the objection that this bill is unconstitutional because it is an attempt to delegate to the State the power to regulate interstate commerce in its essential and fundamental aspect. The other objection which we urge to this bill is the objection which arises out of the provision undertaking to invalidate all contracts relating to an interstate transaction and to deny to the parties the right to maintain any suit on account thereof in any court of the State, destroying all property right in

the subject, whenever any person interested therein—that is, in the liquor—directly or indirectly, or in any manner connected with the transaction, intends to receive, possess, or keep, or in any manner use it, in violation of any law of the State to which it is destined, enacted in the exercise of its police power.

In other words, if a brewer in Cincinnati in good faith sells a package of beer to a citizen of another State, and it turns out that the latter intended to receive, possess, use, or dispose of the beer in violation of the law of his State, then the contract is declared to be invalid; it can not be enforced in any of the courts of the United States. The Cincinnati brewer loses his right of property, although he does not know of the intent of the consignee and is himself acting in perfectly good faith. That is immaterial, according to this statute.

We submit that under constitutional government in a free country it is not competent for the legislature to say that a man's property rights shall be destroyed, that his contract rights shall be nullified, because of a wrongful intent of somebody else to the transaction, unknown, uncommunicated to him, to violate a law of a State. A contract is essentially the relation established by the meeting of the minds of the two parties. If one of them is honest and the other dishonest, harboring an unlawful intent, can you take away the first man's right of property? What happens under this bill?

If the citizen of the other State—let me take Tennessee, for instance—having gotten those goods, says, when he is sued in contract for the price, "I intended to violate the law of Tennessee." "What is that?" answers the seller. "I did not intend to violate the law of Tennessee. You do not mean to say that you can keep my goods and make me lose the price because you intended to violate a law of Tennessee?" "Yes." "Why?" "Because an act of Congress has said so."

And that is what this act of Congress would mean. There is no doubt about its meaning, if the committee please—"which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof enacted in the exercise of the police powers of such State, Territory, or District of the United States," etc.

The power to regulate commerce is subject to fundamental limitations imposed upon the exercise of all power. There are many illustrations of that, as, for instance, in the case of *Adair v. United States* (208 U. S., 162), where an act to regulate interstate commerce made it an offense to discharge an employee because he was a member of a labor organization. The Supreme Court of the United States said that Congress has power to regulate interstate commerce, but they can not make it an offense to discharge a man simply because he is a member of a labor union, because that interferes with rights of property and personal liberty under the fifth amendment to the Constitution of the United States.

And so, in regulating interstate commerce, while the power of Congress is complete and plenary, it must be exercised subject to

other limitations in the Constitution underlying all free government, and particularly the fifth amendment, which declares that no person shall be deprived of life, liberty, or property without due process of law.

It is not due process of law to say to a citizen, "Your property is gone; your right of property is gone; you can not maintain any action in any court to secure that property, not because of anything you have done, but because of an intent that another man entertained."

Senator RAYNER. I would like to ask a question for information. I have examined the bill somewhat, and the question that interests me is the legality and constitutionality of this measure. I would like to inquire your opinion of why those words were put in—the words "is intended." If those words had been left out, and the framers of the bill had made the transaction subject to the jurisdiction of the State, would not that have been sufficient, without putting upon the parties who are urging this legislation the burden of proving that it was intended to violate the laws of the State? In other words, do not the framers of the bill put themselves under a burden here that, so far as the legality and constitutionality of the measure are concerned, it is not necessary for them to assume? In other words, if this bill is constitutional as it stands, would it not be constitutional if those words were left out?

Mr. MAXWELL. That constitutional objection would have been removed; the constitutional objection which I am now urging would not have been there.

Senator RAYNER. What I ask is, why were those words "if intended" put in the bill?

Mr. MAXWELL. They were put in there in order to make the transportation of intoxicating liquors impossible. When I urged these objections to the Judiciary Committee of the House, I said that of course no man can sell any intoxicating liquors on credit, because all the purchaser has to do is to say, "I intended to violate the law." The seller says, "I did not intend to violate it," but that makes no difference; the purchaser can say, "You can not recover your money," and that will be the fact. The transaction is invalid from the beginning, and the railroad company can not recover the freight.

Senator RAYNER. That is not the point I am after.

Mr. MAXWELL. Well, that is the point that they are after.

Senator RAYNER. I am not so certain about that. What I want to get at is this: Could they not have attained the same point exactly by leaving these words out? Why do they impose upon themselves something that is difficult to prove? If they had left those words out and made it subject to the jurisdiction of the State, just as it was, practically, in the old bills, would they not honestly have accomplished the same purpose?

Mr. MAXWELL. They would know that such a bill would not be constitutional.

Senator RAYNER. What is the difference?

Mr. MAXWELL. Because they wanted to put this in to give the bill the appearance of constitutionality. They knew a bill which left that out would not have been constitutional—a bill which has been reported unconstitutional time and again. They are putting this in to give to the bill the appearance of being different from the bill which the Senate rejected as unconstitutional in 1909.

Senator RAYNER. Appearance is one thing, but these gentlemen who framed this bill are lawyers and probably knew what they were doing. They must have had some constitutional reason for putting this thing in, and what I want to get at is the constitutional distinction between those words being there and a bill without those words there. I am simply asking for information. It has been going across my mind for several days, since I have read this bill, what is the constitutional difference between a bill with those words in it and a bill with those words out of it? There must be a difference in the minds of the framers of the bill.

Mr. MAXWELL. Suppose they were not in the bill? Suppose the bill said, "No intoxicating liquors shall be shipped into any State provided the law of that State forbids their importation?"

Senator RAYNER. Not exactly that. Suppose the bill read, "Intoxicating liquors, when they come into a State, shall be subject to the jurisdiction of that State?"

Senator BORAH. What do you mean by "when they come in"?

Senator RAYNER. As soon as they get into the State; that they shall be subject to the police powers of the State. What is the difference between a bill so framed and a bill which makes the intent of the parties the point of the legality or illegality?

Mr. MAXWELL. The bill which you have just suggested was a bill which was fully considered by Congress, and Congress reported it was unconstitutional. What is the good of bringing that same old bill here?

Senator RAYNER. I am not bringing the bill here. I am simply asking for information.

Mr. MAXWELL. They say, "We will bring in a new bill. This question has not been before Congress before."

Senator BORAH. I think this new bill was to get around Senator Rayner's opinion on the old bill.

Senator RAYNER. I want to know how it gets around the objection that some of us made to the old bill. This is a salient point in this proposition, and I think we all so considered it. This puts the burden of proof on the parties; in other words, they have subjected themselves to a certain burden of proof, which it is difficult, I think, to sustain. Now, from a constitutional standpoint, why they have subjected themselves to that burden of proof, and how the bill differs in a constitutional standpoint from the bill that some two or three of us objected to before on constitutional grounds, are the points that I would like to have cleared up.

Mr. MAXWELL. If the bill did not have those words in it, it would be the same bill that was here before.

Senator RAYNER. I understood you to say that you think they put those words in for the purpose of giving it a different appearance; but from what constitutional standpoint does it differ from the other? That is what is bothering me.

Mr. MAXWELL. When they say that it shall be unlawful to bring in any intoxicating liquors that are intended to be used in violation of the law of any State, we say that they are leaving it to the State to say whether that intoxicating liquor shall come into the State. There is no law or regulation except as the State imposes, and therefore it is the same old objection that was before the Congress in the

bill against which the Judiciary Committee of the Senate reported, and respecting which Senator Rayner expressed the opinion that it was unconstitutional.

Now, trying to get over that they say, "We present another bill; we present a bill which provides that the intoxicating liquors shall not be transported when such liquor is intended by any person interested therein, directly or indirectly, to be in any manner received, used, possessed, or enjoyed in violation of any law of the State." They do not say when it is "intended" by both of the parties to the transaction.

Senator RAYNER. I understand all that—

Mr. MAXWELL. Or whether it is "intended by any party to the transaction." I have suggested the various difficulties that would arise under this law making it practically impossible to engage in interstate commerce.

Well, one of the gentlemen said, "Let them get the money in advance always when they sell liquor in interstate commerce." We said that that would practically forbid any traffic in intoxicating liquors. Then there was a shout of approval by the proponents of the bill. They said, "Why, that is just what we want to accomplish." We said, "The railroads too will have to require all freight on intoxicating liquors to be paid in advance." They said, "That is what we want." Then one of the members of the House committee said, "Did it occur to you that if they require prepayment on intoxicating liquors that they would have to require the same thing on all articles of commerce or otherwise they would violate the interstate-commerce act by permitting unjust discriminations?" The proponents of this bill do not care anything about that. They want to make it impossible to conduct interstate commerce in liquor, and if this bill passes they do make it impossible, because the transaction is invalidated, not because both parties to the transaction contemplate a violation of the law, but because one party contemplates a violation of the law.

Therefore, when the Cincinnati brewer sells goods on order to a man in Tennessee, he looks at the mercantile agency's reports and finds that he is worthy of credit. He may even inquire into the standing of the man, and if he finds he is a man of good standing, he ships the goods, and the consignee, when he is asked to pay, says, "I will not pay, and you can not recover." "Why not?" "Because I intended to violate the law."

There is no difficulty about proving that, Mr. Senator. All he has got to do, is to say, "I intended to violate the law," and the bill is gone. The railroad company says, "Well, you ought at least to pay the freight." He says, "Not much." "Why not?" "Because I intended to violate the law." "We did not know you intended to violate the law?" "That is wholly immaterial; I intended to violate the law."

Senator RAYNER. Then that affects the policy of the legislation but not the validity of it. It affects the policy of it.

Mr. MAXWELL. It does affect the validity of it.

Senator RAYNER. I understand that the words "is intended" do not make it unconstitutional, but make it worse than the other in your judgment? It does not make it any better than the other?

Mr. MAXWELL. Why, the idea of any citizens of the United States, no matter how much they are enamored of their own reform, coming before a committee of the Senate of the United States and asking that committee to recommend for passage a law which invalidates a contract, destroys contract rights thereunder, and takes away a man's property, if one of the parties intended to violate a law, without the knowledge of the other.

Take this case: In Cincinnati some people drink a glass of beer occasionally, and we sometimes get our beer from a brewery in Newport, which is an excellent brewery.

Suppose a citizen of Cincinnati telephones over to the brewery across the river: "I would like to have a case of quarts." "All right, we will send them." They are shipped over. They are delivered and the brewery sends in its bill, and the man says, "I am not going to pay for that." "Why not?" "Because I intended to violate the law." "Why did you not tell me something about that?" "I do not have to." "What violation of the law did you intend?" "Well, there was to be a party at my house, and some of them were under 21 years of age, and I intended to give each one of them a glass of beer." That would be in violation of the law.

Mr. DINWIDDIE. Not in Ohio.

Mr. MAXWELL. Is it not?

Mr. DINWIDDIE. No, sir.

Mr. MAXWELL. Well, probably Mr. Dinwiddie knows more about the laws of Ohio than I do, but it well might be against the law. All you have to do is to pass such a law.

I am not so familiar with the laws of Ohio as Mr. Dinwiddie, but I think there is a law there forbidding the sale of liquor after 12 o'clock at night. Suppose a reputable saloon keeper in Cincinnati, in a ward where the sale of liquor is allowed by law, but where its sale is prohibited after midnight, orders from the Kentucky brewery a case of beer, and then refuses to pay for it. "Why?" "Because I intended to sell this beer after midnight." Or, "Because I intended to sell it to a minor"; or, "because I intended to sell it in precinct 2 of ward 3, where it is against the law to sell it." "You can sell it in precinct 1, but not in precinct 2." "I intended to sell it there."

Why, the instances in which he might intend to violate the law are as numerous as the regulations for the sale and use of intoxicating liquors in the various States making them. Suppose the State, in the exercise of its police power, forbids the use of liquor altogether—the personal use of intoxicating liquors—and a citizen orders a case of beer and it is delivered to him, and he refuses to pay for it; "I intended to use it for my own personal use."

"Well, you told me when you bought it that you were going to use it under the advice of a physician for the health of your wife."

"Well, I intended to use it myself for personal use." Or he might say, "I intended to give a glass of it to one of my children who is under 21 years of age." There are any number of ways in which a man might violate the law of the State enacted in pursuance of its police powers.

Perhaps Mr. Dinwiddie can tell whether in Oklahoma they allow a man to have possession of more than 2 quarts of liquor.

Mr. DINWIDDIE. Mr. Caldwell can tell you that.

Mr. MAXWELL. Well, if there is not such a law such a law could be passed to-morrow. Therefore it is a fair illustration. Suppose a man orders from one dealer a quart and a half of liquor and from another dealer a quart and a half of liquor, the result will be that he will have three quarts. In ordering each one of those supplies he intended to violate the law which says that he can not have more than two quarts. All he has to do is to say, "I intended to violate the law. You did not know anything about it, but I intended to violate the law in my order of liquor from each of you. Therefore both of you can whistle for your money, and the express company and the railroad company that carried the liquor for you can whistle for their money. That is according to the laws of the United States."

And in such a case it would be contrary to the laws of the United States if this bill is constitutional.

I am very much obliged to the committee for letting me express so fully my views.

Senator NELSON. We will hear Mr. Caldwell now, and then Mr. Gans in conclusion.

ARGUMENT OF HON. FRED S. CALDWELL, OF OKLAHOMA CITY OKLA.

Senator NELSON. You have been United States attorney in Oklahoma, have you not?

Mr. CALDWELL. No, sir; I was State's attorney for a while, connected with the enforcement of the liquor law, for about two years and a half, but never United States attorney.

Mr. Chairman, I have here a list of authorities which pertain to the subject under discussion, and without reading it I will ask permission to hand this list to the reporter, in order that it may be incorporated in the record.

Senator NELSON. Very well.

Mr. CALDWELL. The list is as follows:

CITATION OF AUTHORITIES IN SUPPORT OF ARGUMENT OF FRED S. CALDWELL.

Bowman v. Chicago & North Western Railway Co., 125 U. S., 465; 8 Sup. Ct., 689; 31 Law Ed., 700.

Leisy v. Hardin, 135 U. S., 100; 10 Sup. Ct., 681; 34 Law Ed., 128.

Scott v. Donald, 165 U. S., 66; 17 Sup. Ct., 265; 41 Law Ed., 632.

Mugler v. Kansas, 122 U. S., 661; 8 Sup. Ct., 273; 31 Law Ed., 210.

Rhodes v. Iowa, 170 U. S., 412; 18 Sup. Ct., 664; 42 Law Ed., 1096.

Vance v. Vandercook Co., 170 U. S., 439; 18 Sup. Ct., 676; 42 Law Ed., 1102.

In re Rahrer, 140 U. S., 545; 11 Sup. Ct., 865; 35 Law Ed., 572.

Heyman v. Southern Ry. Co., 203 U. S., 217; 27 Sup. Ct., 104; 51 Law Ed., 178.

American Express Co. v. Iowa, 196 U. S., 133; 25 Sup. Ct., 182; 49 Law Ed., 417.

Adams Express Co. v. Iowa, 196 U. S., 147; 25 Sup. Ct., 185; 49 Law Ed., 424.

Pabst Brewing Co. v. Crenshaw, 198 U. S., 17; 25 Sup. Ct., 552; 42 Law Ed., 925.

Delamater v. South Dakota, 205 U. S., 93; 27 Sup. Ct., 447; 51 Law Ed., 724.

Foppiano v. Speed, 199 U. S., 501; 26 Sup. Ct., 138; 50 Law Ed., 288.

Commonwealth v. Intoxicating Liquors, 107 Mass., 390.

United States v. Brig Malek Adhel, 2 How., 210.

Smith v. State of Maryland, 18 How., 71.

Dobbins Distillery v. United States, 96 U. S., 400; 24 Law Ed., 638.

J. B. Mullen & Co. v. Moseley, 90 Pacific, 986.

Fisher v. McGirr, 1 Gray (Mass.), 1; 61 Amer. Dec., 381.

State v. 18 Casks of Beer, 104 Pacific, 1093.

- Kalloch v. Newbert (Me.), 72 Atl., 736.
 State v. Intoxicating Liquors, 71 Atl. (Me.), 758.
 Gulf, Colorado & Santa Fe R. R. Co. v. State ex rel. Caldwell (Okla.), 116 Pacific, 176.
 Ex parte Oklahoma (U. S.), 55 Law Ed., 431.
 The Vessel Abby Dodge v. United States (U. S.), No. 41, October term, 1911.
 Louisville & Nashville R. R. Co. v. The F. W. Cook Brewing Co. (U. S.) No. 64, October term, 1911.
 Adams Express Co. v. Kentucky, 214 U. S., 218; 53 Law Ed., 972; 29 Sup. Ct., 633.
 Graves v. Johnson, 156 Mass., 211; 30 N. E., 818; 32 Am. St., 446; 15 L. R. A., 834.
 Church v. Proctor, 13 C. C. A., 426; 66 Fed., 240.
 Plumley v. Massachusetts, 135 U. S., 461.
 In re Scheitlin, 99 Fed., 272.
 Crossman et al. v. Lurman et al., 192 U. S., 189; 24 Sup. Ct., 234.
 American Express Co. v. Mullins, 29 Sup. Ct., 381.
 State ex rel. v. Hooker (Okla.), 98 Pacific, 964.
 Schwedes v. State (Okla.), 98 Pacific, 804.
 Champion v. Ames (lottery case), 188 U. S., 321.
 Constitution, Article I, section 8, clause 3: "The Congress shall have power * * * to regulate commerce with foreign nations, among the several States, and with the Indian tribes."
 Constitution, Article I, section 8, clause 18: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."
 Rupert v. United States, 181 Fed., 87; 104 C. C. A., 255, construing and sustaining the Lacey Act.
 Silz v. Hesterberg, 211 U. S., 31; 290 Sup. Ct., 10; 53 Law Ed., 75.

I shall not try to follow Mr. Maxwell's argument literally. I prefer, first of all, to address myself to the members of the committee, and present to the committee in my feeble way the condition that now exists with reference to this matter and wherein I think this bill or these bills—I refer either to the McCumber bill or the Kenyon bill—are constitutional, and wherein they meet the purposes which we seek to attain.

The McCumber bill, with the exception of one word, is the same as the Kenyon bill, without the second section. However, I would make this suggestion with reference to the title of the McCumber bill. I think the title is misleading and not well chosen. The title to the Kenyon bill, I think, expresses the real object of the bill, "A bill to prohibit interstate commerce in alcoholic liquors in certain cases." The McCumber bill says, "A bill to divest intoxicating liquors of their interstate character in certain cases."

Now, logically, alcoholic liquor and no other article or commodity can be divested of that which they have never acquired, so that in order to divest them of their interstate-commerce character they must have first acquired that character, and the theory of this bill is that Congress shall so legislate that any intoxicating liquor intended to be used in violation of the laws of the State into which it is intended to be introduced shall never become interstate commerce, shall never acquire that character, even though it may be in the channels of interstate commerce.

In other words, I take it that it is possible to have an interstate shipment of that which is not interstate commerce. The terms, while used interchangeably, sometimes, strictly speaking, are not interchangeable terms. Putrid meat might be an interstate shipment; it would not be interstate commerce. So here. The object of this bill

is that Congress shall say, if it is intended to use the subject matter of the shipment in violation of the laws of the State into which it is sought to be introduced, then it is not interstate commerce.

Senator BORAH. If that were carried to its logical conclusion, would it not result that you could stop this shipment before it started from the State from which it was to be shipped?

Mr. CALDWELL. No; not under this bill. I say no. I have not considered carefully what the Federal Government might do. There is no penalty provided here, and so the Federal courts could not impose any penalties of forfeiture, fines, imprisonment, or otherwise, upon any person connected with the transaction.

Possibly, though, if that were shown in a particular case—and I think each case would have to be treated by itself—they might intercept it. But the States could not, at the point of origin, and that for the reason that one State or one nation never enforces the penal laws of another State or nation.

That in this country has been carried so far that the Supreme Court of the United States, in the case of *Wisconsin v. Pelican Insurance Co.*, held that they would even look behind a judgment to see that the judgment had been recovered against the insurance company for a penalty provided by the laws of Wisconsin, in case foreign insurance companies carried on business in violation of the laws of Wisconsin, and therefore when Wisconsin in a Federal court sued upon that judgment the Supreme Court of the United States said that the Federal courts could not and would not take jurisdiction, because indirectly, if not directly, it had the effect of enforcing the penal laws of the State of Wisconsin.

So the shipment, we will say, originates in Missouri—and I will take illustrations near my own State because I am more familiar with them—and it is in the hands of the carrier, and it is intended to be used in violation of the laws of the State of Oklahoma, and it is consigned, we will say, to Oklahoma City.

The laws of Missouri can not touch the shipment. Of course, I am not saying that it could not be arrested, so to speak—that is, under due process of law seized in a search and seizure proceeding and brought into court and tried—but the facts being shown in such judicial proceeding that the liquor was being taken to Oklahoma and was intended to be used in violation of the laws of the State of Oklahoma, immediately the Missouri court would lose jurisdiction and would dismiss the matter, because Missouri would have nothing to say or do in reference to the enforcement of the penal laws or criminal laws of the State of Oklahoma.

But carry the illustration further. Suppose that the transportation commences and the liquor arrives within the territorial limits of the State of Oklahoma, and without going through, in detail, the procedure, I assume—and I take it there can be no question about it—that always things must be done by due process of law.

For instance—and I think every State has a similar provision—the State of Oklahoma provides that a search and a seizure warrant can not issue except upon a showing of probable cause, supported by oath or affirmation.

Now, the liquor, we will say, is still in transit, or at least it is in the hands of the carrier under the interstate shipment contract. When a warrant is sworn out in proper form and probable cause

has been shown to a magistrate of Oklahoma—just as in a proper case a warrant for the arrest of a person on a train going from Kansas City to Dallas, Tex., might be issued and that person might be met at the station in Oklahoma City and taken out of his berth, even at night, if there were an indictment pending against him in Oklahoma charging him with murder or a felony—this case of whisky or barrel of whisky, or whatever it may be, may be arrested and brought into court for trial. It is charged with being a nuisance, because it is charged that some one has possession of it, describing the place as particularly as may be, with intent to violate the liquor laws of Oklahoma.

Now, as the law now stands, the liquor, even though it be a carload, may be brought into court and the claimant may concede that it was intended to be used in violation of the law of the State, but he pleads the protection of the commerce clause of the Constitution of the United States—that is, he says just this: "This liquor was purchased in Kansas City, Mo., the shipment originated there; it was brought to Oklahoma City by the Santa Fe Railroad Co., a common carrier, an interstate carrier, and when seized it was still in the possession of the interstate carrier under the contract of interstate shipment. It is interstate commerce. The State of Oklahoma can not touch it."

There is no question about the law now. There is only one valid order that the State court could then make, and that would be to order the liquor delivered back to the carrier. But if this bill were in effect, that would not be a valid claim. Why? Because that would not determine the status or character of the liquor as interstate commerce. The State could traverse that claim by saying, "Yes; but this liquor was intended to be used in violation of the laws of the State of Oklahoma and Congress, in the exercise of its power to regulate interstate Commerce, has taken that out of interstate commerce; Congress has said there shall not be interstate commerce in liquor intended to be used in violation of the laws of the State into which it is introduced; Congress has prohibited interstate commerce in liquor so intended."

Now, counsel contends that that is a novel feature, that the very idea of permitting the status of the liquor to be determined by the intent of the possessors, the parties connected with the transaction, is novel and preposterous. I think not.

In a case that I have cited in the list that I have given the reporter, decided 50 years ago, or nearly that long ago, Chief Justice Shaw, of Massachusetts, under a similar search-and-seizure law in Massachusetts, said this about laws of that sort: "That the proceeding is in rem, against the thing, and the law has this effect. I am now speaking about liquor possessed with intent to violate the laws of the State, independent of interstate commerce—apart from interstate commerce. The intent to violate the laws of the State impresses upon the thing, the liquor, the character of a nuisance, which in legal effect divests it of its property rights. If intended for a lawful purpose the liquor, the property, is not a nuisance, but the intent of the possessor to violate the law with it impresses the liquor with the character of a nuisance, and that nuisance is abated by seizing the liquor and destroying it. It is forfeited."

Now, then, if the property right in liquor may be divested, because of the intent of the possessor, where is the novelty about Congress saying that the interstate character of liquor shall be determined by the intent of the parties connected with the transaction?

In other words, the intent to violate the laws of the State of destination shall divest the interstate-commerce shipment of its interstate-commerce character. That, I think, is the theory upon which this bill proceeds. I think that is just what it would do, and nothing more; and always remember that that question of intent is a question of fact to be determined in a judicial proceeding, according to due process of law, and while the litigation would, I think, invariably originate in a State court, yet a Federal question could always be reserved and a writ of error taken to the Supreme Court of the United States, provided the claimant should think his property rights and his constitutional rights, or any right conferred upon him by act of Congress, were not properly preserved.

Now, the question of precedent has been discussed here. I mean precedent, now, by way of other legislation similar to this. Counsel has very ably discussed that, and he has stated that the game law is not in point, even though it be conceded that it be constitutional, and that the constitutionality of the Lacey game act has never been passed upon by any court. It had not been until recently, but there is a case decided by the Circuit Court of Appeals of the Eighth Circuit, which happens to be my circuit, which counsel overlooked. It was decided in 1910. It is on my list of cases. It is the case of *Rupert v. The United States*, 181 Federal, page 87; 104 C. C. A., 255, in which the act was construed and its constitutionality sustained.

Senator RAYNER. Have you that here?

Mr. CALDWELL. No, sir.

Senator RAYNER. You say that it was attacked upon the ground that it was not a regulation of Congress, and it was sustained?

Mr. CALDWELL. The constitutionality of the Lacey Act was sustained in that decision; yes, sir.

Senator RAYNER. And they held that it was within the power of Congress to pass the act?

Mr. CALDWELL. Yes, sir; defendant demurred to the indictment. There the question was as to whether or not the indictment was sufficient without alleging—that is, without the negative averment—that the quail had been killed out of season, and the court said that that was immaterial, because, inasmuch as the law of Oklahoma prohibited the shipment of quail out of the State or Territory at any time, it made no difference whether they were killed in season or out of season.

You see the last part of section 242 provides:

Provided, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the State, Territory, or district in which the same are captured or killed.

If the State, Territory, or district prohibits the shipment of game out of the State, Territory, or district, regardless of whether it was killed in season or out of season, then if that law is constitutional it would be immaterial in a prosecution when the game was killed.

Senator RAYNER. Was not that case based upon the Geer case? [Reading from the Rupert case.]

The provisions of the Lacey Act of May 25, 1900, prohibiting the shipment, or transportation in interstate commerce, of game, killed in violation of the local laws, requiring all packages containing game shipped in interstate commerce to be plainly marked, showing the name and address of the shipper and nature of the contents, and making the violation of such provisions a criminal offense, are within the powers of Congress and constitutional and valid.

Mr. CALDWELL. I did not know that they had this case here. Mr. Maxwell said that the act had not been passed upon. But you will find that, and in the fine print in the opinion you will see the attack squarely raising the constitutionality of the act was made on the law by the defendant.

Now let us take another act. Section 245 of the Penal Code provides:

That whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or any common carrier for carriage from one State, Territory, or district of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, to any State, Territory, or district of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, any drug, medicine, article, or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use, or whoever shall take or cause to be taken from such express company—

That is, the other end of it, the receiver—

or common carrier, any matter or thing, the depositing of which for carriage is herein made unlawful, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

Senator BORAH. I may be in error, and I ask for information, but that act leaves the intent so that it must be brought home to each party, does it not?

Mr. CALDWELL. Yes; this is purely penal. This does not affect the contract. This is making it a crime. In other words, it is going further than our act. Here is a penalty imposed subjecting the party to a fine and imprisonment if he violates the law. If they do—do what? Why, deposit with an interstate carrier for transportation, or if they knowingly receive. Now, the “knowingly” does not apply to the first proposition, because whoever deposits a thing with an express company certainly knows what he intends to do when he deposits it. But the other proposition, I might deposit in the mail an article intending it for a prohibited purpose, and the innocent consignee, knowing nothing about it, might receive it. So he ought not to be punished unless he knowingly receives it.

Senator BORAH. Can you declare a contract void so as to deprive one man of his property right upon the evil intent of another party?

Mr. CALDWELL. I was going to take that up later.

Senator BORAH. Well, I will not interrupt you, then.

Mr. CALDWELL. Well, it does not interrupt me, really. As a matter of fact in a hearing of this sort it generally assists me to have questions asked, and it is information I want to give you if I have it. I think this is the rule. I may be wrong about it, but I learned it when I first studied law. That no one can take advantage of his own wrong; that there is such a thing as estoppel in law, and it is just as much law as any other rule of law, that it applies throughout

all the law of contracts. And what is it? Well, it is simply that no one can take advantage of his own wrong.

The courts are instituted to administer justice, not to permit one man to wrongfully, by reason of his own trickery and wrongful act, beat another one out of his property or his money. So take this bill, and take the case the counsel cited in his illustration of his Cincinnati brewer, who shipped a keg of beer or a case of beer to a citizen of my State, say, Oklahoma, where there is State-wide prohibition, but where it is not unlawful to use liquor for one's own personal use, or have it in one's home for personal use. That does not violate our law. We do not prohibit the personal use of liquor.

But, he says, that if credit be extended the consignee can say "Oh, but I intended to use this in violation of the law and you can not recover."

What is he doing? He is taking advantage of his own wrong. He is estopped from resorting to any such defense as that. There is not a court in the land, I say, which would ever entertain such a defense. It is abhorrent to the spirit of justice to permit him to say that he intended to violate the law. Now, as to the rule of law—

Senator BORAH. Do you mean to say that the defendant, if he was sued, could not say that he intended to violate the law, and use it as a defense?

Mr. CALDWELL. That alone would not be a defense.

Senator BORAH. I think the Supreme Court of the United States settled that under the Sherman Antitrust Act.

Mr. CALDWELL. I am probably not as familiar with that as you are, Senator, but I remember one of those decisions—the wall-paper case—in which they sustained a contract which perhaps in some respects was in violation of the Sherman Act; but they distinguished on a principle, which I think is the principle we are arguing here. I will not undertake to give it offhand, because it has been some time since I read that case. It was decided about two years ago, I think. It is the wall-paper case, anyhow. I was going to say that in England the rule is this: That bare knowledge on the part of the vendor is sufficient to make the contract illegal and void; that is, bare knowledge of the fact that the vendee intends to use the article sold in violation of law. The American rule does not go so far. You will find the principle discussed in the case of *Graves v. Johnson*, a Massachusetts case that I have cited, in which Mr. Justice Holmes, then on the supreme bench of Massachusetts, wrote the opinion; and the rule in America is that there must be some participation.

For instance, in the Massachusetts case of *Graves v. Johnson* the illegality of the contract turned on this: A liquor dealer in Massachusetts sold liquor to a man in Maine, with a view to violating the laws of the State of Maine. It did not say how, and it did not appear how, but they said that inasmuch as he made the sale with the view of violating the laws of the State of Maine that that was a sufficient participation to make his contract illegal and void and he could not recover even though suit was brought in the Massachusetts court.

I think I have here a quotation that I can give from an English case, briefly. Yes, here is the English rule. It is stated by the Su-

preme Court of the United States in the case of *Hanour v. Doane*, 12 Wallace, 332, and I am reading now from the body of the opinion:

"The decision of the Chief Justice in the case above referred to has been followed in several other English cases. It was followed by Lord Edenberry in *Langdon v. Hughes*, where a druggist sold drugs of a noxious and unwholesome nature to a brewer knowing that they were to be used in his brewery, contrary to law, and it was held that he could not recover the price."

Now, the American rule, I say, without having gone over the authorities, it is my judgment that it is the weight of authority, although not universally so, that you must show more than mere knowledge; there must be some participation.

I had this matter before the supreme court of our State in a case which has been recently decided, and which I have cited among the citations, the case of *Gulf, Colorado & Santa Fe Railroad Co. and others v. State*, upon relation of myself, where we had this proposition before the courts.

In my official capacity I brought suit in the Superior Court of Oklahoma County, asking that every interstate carrier be enjoined from delivering shipments of alcoholic liquors in the State of Oklahoma to persons whom the carrier knew intended to use the liquors in violation of the laws of the State of Oklahoma upon this theory: The consignee had paid the Federal tax, we will say, which is *prima facie* evidence of his intent to violate the law, and he does intend to violate the law. Ten cases of whisky are shipped to him from Kansas City. The Santa Fe Railroad makes a contract whereby it agrees for a certain sum to carry the liquor from Kansas City to A B, who intends to violate the law. As soon as the contract is completed, when it is discharged by performance, this inevitably results: Immediately the liquor becomes a public nuisance, and immediately A B is a criminal, because it is a crime in Oklahoma to possess liquor with intent to violate any provision of the liquor law.

Those two things—possession of liquor with intent to violate any provision of the liquor law—make a crime.

Now, the delivery is made. A B is in possession of the liquor, and he intends to violate the law. Necessarily the liquor is a nuisance. It can be seized, then; there is no question about that, and destroyed, and he can be put in jail. But we were powerless unless I could go further. The State of Oklahoma was powerless to prevent the commission of that crime. It could only punish after the crime had been committed.

So I asked a court of equity for an injunction against the carrier upon the theory that the contract of transportation was an illegal contract where it resulted in that sort of thing. In other words, stating it generally, a contract made with the view of violating the laws of a foreign country is illegal according to the laws, I think, of every civilized country. A contract made in England with a view to violating the laws of France is illegal and void and will not be enforced in England nor in France.

So a contract made in Missouri not only with the view of violating a law of Oklahoma, but which can not be performed without creating in the State of Oklahoma a liquor nuisance and making the consignee a criminal, is illegal.

In the opinion you will see that the learned Supreme Court of Oklahoma simply hurdled over that proposition. Now, I got the injunction in the trial court. I got an injunction. The carriers appealed and the case was reversed. They said that while the railroad company could not sue in an Oklahoma court for its freight in a case like that—for instance, suppose it is a carload of whisky intended to be used in violation of the laws of Oklahoma by the consignee, and the railroad company has a wreck and the whisky is destroyed and the consignee sues the railroad company in an Oklahoma court for the value of the liquor, and the railroad company comes back at him and pleads the illegality of the contract in that he intended to use it in violation of the law of Oklahoma, they are simply saying to him, "By our failure to deliver to you that carload of liquor you were prevented from being a criminal. If we had delivered it to you you would have been a criminal. If we had delivered it to you it would have been a liquor nuisance, and thereby all property right in it would have been divested. You can not complain of that."

While they do not say so in so many words, and knowing the discussion that happened on the bench when this case was argued, they virtually conceded that the contract could not be enforced in the Oklahoma courts, but they say that the court's power can not go that far. In other words, that the judicial power of the State goes no further than the legislative power of the State, and that inasmuch as the Legislature of Oklahoma is, under the present status of law, powerless to prohibit the shipment of that carload of whisky into Oklahoma, even though it is intended to be used in violation of the laws of Oklahoma, that the judicial power of the State of Oklahoma is likewise powerless to enjoin it being brought into Oklahoma for the express purpose of being used in violation of the laws of Oklahoma.

In other words, we can not prevent the commission of that nuisance. Now, then, I think the case that counsel cited here, the case of the Louisville & Nashville Railroad Co. against Cook Brewing Co., really supports the Supreme Court of Oklahoma in that proposition, as abhorrent as it is to me personally. I think it supports that contention; because in that case you have this situation: It is contrary to the laws of Kentucky to ship liquor from a wet county into a dry county, and the L. & N. Railroad Co. could be prosecuted in a Kentucky court and punished and fined if they did transport liquor from a wet county in Kentucky to a dry county.

But here is a consignment of liquor tendered the L. & N. Railroad by the Cook Brewing Co. in Indiana for delivery in a dry county in Kentucky, and they held that the railroad company not only can not refuse to receive it and deliver it in that dry county, but the Federal court will mandamus them to receive it and deliver it in that dry county.

Mr. Justice Lurton in that decision says that the Kentucky law is a good law and a valid law, and that the action of the railroad company in refusing to carry liquor from a wet county in Kentucky to a dry county is commendable, but its action in refusing to carry liquor from a wet State to that dry county in Kentucky can not be sustained, because the power to regulate commerce is with Congress

and Congress has not prohibited that sort of thing. In effect that is what I think the case holds.

Senator NELSON. That is right.

Mr. CALDWELL. Now, then, if that be the situation—and as President Cleveland once said upon the tariff, I believe it is a condition and not a theory that confronts us—I think that while there is a great deal of theory and what some people call fanaticism about this liquor question, that there are some features of it which are really now reduced to a condition. That is this: Under this dual form of government of ours, the States have the police power and Congress, under the commerce clause of the Constitution, has the power to regulate interstate commerce. Sometimes they come in conflict.

There was a controversy, and in the minds of some there may be still a controversy, as to which is supreme in case of conflict. In my mind the Supreme Court of the United States has settled it, that where there is a conflict between the exercise of the police power by the State and the regulation of interstate commerce by Congress, the commerce power is supreme.

Senator BORAH. You mean a substantial conflict?

Mr. CALDWELL. Yes.

Senator RAYNER. The Pittsburgh bridge case, I suppose, is one that decides that?

Mr. CALDWELL. Yes; and I think these liquor cases virtually held that.

If that be so, then, if the power of Congress to regulate commerce is so strong that it is supreme and above the police power of the State, it is not a weakling—it has not many limitations. Learned text writers say that it has only two limitations—the limitation that no duty or tariff can be imposed on shipments from one State to another, and that there shall not be a preference given the ports of one State over the ports of another.

Senator NELSON. That no tariff shall be levied on exports?

Mr. CALDWELL. Yes; and that the ports of one State shall not be preferred. In other words, you could not permit articles to come in free in New York and put a tariff on them if they came in through the port of New Orleans.

Now, another thing is settled: As the chairman suggested, all of this power is conferred in that one clause—the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. Now, it is settled that the power to regulate commerce with foreign nations includes the power to prohibit that commerce with foreign nations, regardless of the nature of the commodity.

Senator RAYNER. You drew this bill, did you not?

Mr. CALDWELL. Yes, sir.

Senator RAYNER. I want to ask you the same question that I asked the speaker who preceded you. I am asking, of course, for information. Your argument is very instructive and interesting. We did not have this case (*Silz v. Hesterberg*) before us when similar legislation was proposed several years ago, because this question was only decided in 1911. Of course I can see the ground upon which that is based, as you stated, but what I want to get at is this: Some of us voted against the last bill, and Mr. Knox took the ground, and I

think Senator Dillingham took the ground, and I took the ground, and I think Senator Nelson also, and perhaps Senator Borah—

Senator BORAH. No; that was before I was in the Senate.

Mr. CALDWELL. Senator Bacon, I think, and Senator Nelson.

Senator RAYNER. Yes. Well, we took the ground that the commercial contract was not complete until it reached the hands of the consignee. That is the ground we took. Now, from a constitutional aspect—I am not talking about the policy now—does this bill in any way enable us to come to a different conclusion from the conclusion we reached when the matter was up before? If we came to that conclusion upon that bill, as I have stated, is there anything which makes this bill constitutional? I am assuming that the other bill was unconstitutional. I want to see the difference between the two bills. Those of us who took the position that we could not vote for it because it violated the Constitution, I think would like to know if there is anything in this bill that would enable us to vote for it upon constitutional grounds; anything here that was not in the other bill? Did you have the idea that you were improving it in a constitutional aspect when you drew this bill; did you think that if you worded it as it is worded it might enable some of us who voted against it before to change our minds as to its constitutionality?

Senator NELSON. Before you proceed, I would like to state that Senator Knox did not in terms hold that Congress had no power to legislate on the subject; but if I recollect rightly he held that it was premature, the States not having gone as far as they might to protect themselves, and until they exhausted their power Congress ought not to intervene. That is my recollection of Senator Knox's position.

Mr. CALDWELL. Well, the report, of course, is familiar to you gentlemen. It is still undoubtedly before you. I think Senator Rayner's question goes right to the heart of the whole matter.

Senator RAYNER. That is what I think myself.

Mr. CALDWELL. I confess frankly that before I formulated this bill—that is, the Webb bill and the McCumber bill—I studied those reports, and I was unable to get around the argument that the Senator made about the continuity of the contract of transportation. Now, conceding that it is legitimate—that it is, as the Chief Justice has put it, interstate commerce in its fundamental aspect—it seemed to me that under those bills, when the State power began to operate, it operated upon that which was then interstate commerce; and if so, that was a delegation of power. But now, if the State law, when it begins to operate, operates upon that which is not interstate commerce, and is not interstate commerce because of something that Congress has said, then there is no delegation of power.

I think this bill does get around that. Of course, I may be wrong.

Senator RAYNER. I knew you had some constitutional grounds. That is what I wanted to get at.

Mr. CALDWELL. Yes, sir; it was my endeavor to get around that. For instance, here is the liquor in the hands of the carrier. As the law now stands, that absolutely makes it interstate commerce. There is no question about that. Liquor in the hands of the carrier, under the contract of interstate shipment, is interstate commerce now. But suppose Congress says that liquor, even though in the hands of the carrier, which is intended to be used in violation of the laws of

the State of destination shall not be interstate commerce; then it is not interstate commerce. If the law of the State operates upon it, it is operating upon that which is not interstate commerce, and of course there is no delegation of power to the State to regulate interstate commerce.

Senator BORAH. Do you take the position that Congress would have the power to prohibit the shipment of any article which any State could condemn by its laws?

Mr. CALDWELL. No, sir; I do not. I confess that that is a difficult question.

Senator RAYNER. What is the difference? That is a very important question. What is the difference between whisky and clothing, for instance? Suppose the conditions were the same that they were when the States had the old articles of confederation. One State might say: "We do not want any clothing brought in because it is injuring our manufacturers." Now, do you think we would have a right to say that? The Supreme Court has said that it is a legitimate article of commerce—

Mr. CALDWELL. And they have said some other things about it.

Senator RAYNER. I am just asking this question for information, you understand. Would we not have the right to do this with any article as we have with whisky?

Mr. CALDWELL. No; I would say not. As I say, when the question that Senator Borah asks was first suggested it rather stumped me. I was afraid that I would have to say yes, or else that I would have to say that Congress did not have that power. But I have since found a statement—and it is quoted by Senator Nelson in his report of four years ago—in the lottery case, which I think answers that—

Senator RAYNER. Before you read that case let me say this, of course we have gone over that case a hundred times in the Senate. I do not mean that Congress would not have the right, and I am not going into the question of whether the power to regulate does not carry with it the power to interdict and prohibit, but whether we could not, having once passed a law of that kind with reference to whisky, pass a similar law with reference to any other article?

Senator BORAH. That was my question.

Senator RAYNER. Yes; I understand it was, but I do not think he quite answered it.

Senator NELSON. Here is the trouble, it seems to me. The police power of the State does not extend to all of these subjects. It is only those that are considered detrimental to health and morals. There the police power of the State is complete; but the police power of the State would not extend to prevent the sale of flour or any wholesome commodity.

Senator RAYNER. We had it in the Beveridge bill, here—the child-labor bill. It might extend to a hundred things.

Senator NELSON. In the Mugler case, if I remember right, they passed upon the question of whether this commodity was within the police power of the State, and the question back of it all is the question that has not been discussed according to my mind, and that is this question: The Supreme Court has held that the State has complete police power over the sale and manufacture of liquor. They even have held it in a case where a brewer made the contention that

it amounted to confiscation of his brewery. Now, if the people of Oklahoma have no right to engage in the manufacture and sale of intoxicating liquors in your State, why should I, as a citizen of Minnesota, have a greater right in your State than your own citizens? That is the question that I would like to have answered.

Senator RAYNER. That has been discussed.

Mr. CALDWELL. I think Senator Nelson is right in this: That whisky does not stand on the same basis that flour is on.

Senator BORAH. That is what I was trying to get at.

Mr. CALDWELL. Let me try and get my statement in. I have got to start a little back of the real proposition. But take the Mugler case. There the Supreme Court of the United States held this: That Mugler had no right as a citizen of the United States to maintain and operate his brewery in the State of Kansas in violation of the laws of the State of Kansas, even though he intended the product for his own personal use and interstate commerce to points outside of the State.

That, I think, is what was held in that case. Now, then, in my judgment, they could not say that that would be the law if Mugler had been operating a gristmill. If the State of Kansas had passed a law providing that all gristmills, even though operated in a way that could not offend on any ground of public policy, just simply to make good, wholesome flour for bread, in my judgment the Kansas law would have been clearly unconstitutional and void, because Mr. Justice Harlan, in that very able opinion—and I think he came as near to laying down a definition of the police power in that great case as a definition of the police power has ever been made——

Senator NELSON. Do you mean the lottery case?

Mr. CALDWELL. No; I mean the Mugler case. He says that primarily the question as to whether or not the act which is prohibited can affect injuriously other people, the property rights of others, or the public generally, is a question for the legislature; but that if the legislature should go so far that there could be absolutely no reasonable connection between the law and the protection of the public welfare, the health, and so forth, then it would be void, and that the courts can review the acts of the legislature for the purpose of determining that. In the late case of *Noble State Bank v. Haskell*, Mr. Justice Holmes tersely put it and in effect says the same thing, where they sustain the bank law of Oklahoma. When pressed by the counsel for the Noble State Bank to define specifically, he states the limitation of the police power is pricked out by these decisions, and we do not have to say just where it is, except that in this case it is safe to say that the bank-guaranty law comes well within the police power.

Now, then, to my mind the right to operate a mill to manufacture flour as clearly comes within the other realm; it can not be prohibited. They might regulate the hours of labor, the sanitary conditions about the mill, but they could not absolutely say that flour should not be manufactured.

Senator NELSON. Or sold?

Mr. CALDWELL. Or sold. And in that sense I say that whisky stands on a different basis from flour.

Senator RAYNER. There are a thousand police regulations outside of flour. We passed a law in Maryland taxing oysters that came in

from the Virginia shore, in order to protect the oyster beds. That law has been held to be unconstitutional. What I mean to say is this: There are so many things that come under the police power that I do not think you can say that whisky separates itself, if the courts have not said that it is different. The point is, how can you separate it from the exercise of every other police power?

Mr. CALDWELL. I think because good, wholesome flour hurts no one we can give any quantity of bread made from flour to our children and it will not hurt them.

Mr. GANS. It will hurt them if they eat too much.

Mr. CALDWELL. No; I do not think it will. It will become repugnant to them before they will eat too much. But whisky has an opposite effect. You can easily injure children by giving them whisky, and if you give them enough of it, of course, it would destroy life, or at least break them down in their health.

I am coming to the language in this decision, which I think supports my contention. This is from the lottery case.

Senator NELSON. Give us the citation of that.

Mr. CALDWELL. This is the lottery case, 188 U. S., page 321.

Senator NELSON. That was Mr. Justice Harlan?

Mr. CALDWELL. Yes. [Reading:]

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations, except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which in any degree countenances the suggestion that one may of right carry, or cause to be carried, from one State to another that which will harm the public morals?

We can not think of any clause of that instrument that could possibly be invoked by those who assert their right to send the lottery tickets from State to State, except the one providing that no person shall be deprived of his liberty without due process of law.

But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals.

As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the widespread pestilence of lotteries and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States, perhaps all of them, which for the protection of the public morals prohibit the drawing of lotteries as well as the sale or circulation of lottery tickets within their respective limits.

It said in effect that it would not permit the declared policy of the State which sought to protect its people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce.

Senator RAYNER. Of course you see the distinction between that case and what we are engaged in now. That was a congressional law, a uniform law throughout the United States. That case would

come up if we prohibited the sale of whisky. That case has been assailed every time it is quoted, but there it is, and I have always thought that under that case perhaps Congress would have a right to pass a general law to prohibit the sale of whisky or the transportation of whisky, but this is a different proposition and I do not see how it reaches it.

Mr. CALDWELL. Let me try to state wherein I think it reaches the question. The court says there that Congress has the right to regulate interstate commerce so as not to defeat the police powers of the State.

Senator RAYNER. That is merely as to something they say; that is not the ground they put their decision on. I think we would have the right to prohibit the sale of whisky throughout the United States under that decision referred to, and you think so, too, do you not?

Mr. CALDWELL. Yes; but I think so, for the reason stated by the Supreme Court of the United States as the ground on which this decision is based; and *Mugler v. Kansas* and *Crowley v. Christianson*, I think, support that view. Those cases state that whisky is different from flour. Now, if it was not, I do not believe you could do that. That is exactly, it seems to me, what is presented to Congress here. Now, I stated to you that the shipment, as soon as delivered at the point of destination in Oklahoma, inevitably creates a liquor nuisance in our State, and the consignee is a criminal. Of course, he is not always caught, because he waits until he can get it out of the express office or the freight office clandestinely. But if we could remove that thing before it gets into his possession, then he would not be a criminal. Now, then, if Congress can regulate commerce so that the Federal Government in the exercise of its commerce power, instead of interfering with or instead of there being a conflict between that power and the police power of the State, there would be harmony and cooperation, it certainly is a thing to be desired.

This dual form of government ought in all of its parts to work in harmony and articulate together, but see the position of a State——

Senator RAYNER. Have you read the discussion that occurred in reference to Senator Beveridge's child-labor bill when it was debated in the Senate?

Mr. CALDWELL. No, sir.

Senator RAYNER. The very point you state came up, and Senator Spooner, who made the strongest argument against it, held that the exercise of that very power was an interference with the reserved power of the State. That put a brand upon an article before it reached interstate commerce. The idea there was that all goods made by child labor should not be shipped from one State to another. His point was that that was getting at the article before it became an article of interstate commerce. I do not know whether you saw that discussion. All these authorities were cited there, on that very point that you are making now.

Mr. CALDWELL. I made a note when Mr. Maxwell was talking on that contract proposition of his. I think the very question you raise answers it. Now, if the sale is made and completed in Missouri, where it is lawful to make the sale, and the consignee takes his liquor down to Oklahoma and uses it in violation of law, or intends to use it in violation of the law, and then refuses to pay for

it, I believe he is met with this proposition: That the transaction between him and the vendor did not come within the scope of this bill because it was not interstate commerce.

In other words, I go to St. Louis, and I buy a carload of whisky from a distiller. That is a Missouri transaction, and it is not interstate commerce, even though I intend to make it the subject of interstate commerce. Then I go to the railroad company and I have the liquor consigned to Oklahoma. It would be absurd, when sued upon the contract for the purchase price, for me to plead that I intended to use it in violation of the law, because the Missouri transaction is separated from the interstate commerce features of the transaction. Congress could not say what I could do or what would be the legal effect of the contract made between the two parties in the State of Missouri, apart from the interstate commerce transaction.

Senator NELSON. Excuse me for interrupting, but do you think you could finish by 2 o'clock?

Mr. CALDWELL. Yes, sir; I will be able to finish by 2 o'clock.

Senator NELSON. Then, we will take a recess at 2 o'clock and hear Mr. Gans after the recess. You may proceed with your argument.

Mr. CALDWELL. While I had made a note to take it up a little later, the Senator's question, which was quite pertinent, brought that out—that a great deal of Mr. Maxwell's worry about the vendor, even though he should sell on credit, is answered in that the transaction between the vendor and the vendee, if consummated in the State of origin, so to speak, is a transaction of that State apart from any interstate commerce, and this act could only strike at contracts which are interstate commerce in their fundamental aspects, so to speak.

Mr. MAXWELL. You do not deny that if a man in Arkansas sends to a brewery in Ohio for two kegs of beer to be sent to him by express or freight that that is an interstate transaction, not only the sale, but the shipment?

Mr. CALDWELL. I believe that the law is this: That if I order two kegs of beer to be sent by freight or express that delivery to the carrier at the point of origin vests title in me and that it is my property from that time on, so that the sale would be in Ohio.

Congress has already prohibited C. O. D. shipments, and I think, notwithstanding what counsel has said on the other side over at the House the other day, also shippers order shipments.

It is true that the district judges in Oklahoma held against me on that contention, but Judge Amidon, in a recent decision from North Dakota, has recently held that those provisions of the penal code which strike down C. O. D. shipments and which say that no person shall act as the agent of the vendor for the purpose of completing the sale, by collecting the purchase price, makes it a crime for a bank to collect that purchase price, bill of lading with draft attached. (190 Fed. Rep., 336.) But be that as it may, Congress has the power to act, and I think, as Senator Rayner has suggested, that all goes to the policy of the legislation. So far as I am concerned, I think it would be a wise policy, even though the liquor seller had to collect his money in advance in order to protect himself, even though the carrier had to collect his freight in advance in order to protect himself.

It is the rule throughout my section of the country that household goods can not be shipped unless the freight is paid in advance, and I have never heard it contended that that is a discrimination, because household goods will not be transported from one State to another unless the freight is paid in advance.

Furthermore, I believe that the railroad company, within the exercise of a reasonable discretion, can say to what shipper it will extend credit and to what shipper it will not extend credit. That could only offend against the acts of Congress provided it was done as a subterfuge in order to give one shipper an advantage over another.

Counsel says that this bill does nothing except to refer the entire matter to the States, that it does not promulgate a rule nor declare a rule.

What is a rule of commerce or of law? Take the question referred to a short time ago, the legality of the contract. What determines its legality in that sphere?

The question of whether or not the parties intend to violate the laws of another State. A contract made in Massachusetts with a view to violating the laws of Maine is an illegal contract. That is a rule of law.

Now, here is a rule of commerce. Liquor intended to be used in violation of the laws of the State of destination, to put it shortly, is not interstate commerce. I think that is a great deal more certain than the Sherman law against combinations, wherein you must show that it is reasonable or unreasonable. You get down to the line, and there must be a difference somewhere between a combination in restraint of trade which is reasonable and one which is unreasonable, and when you get down near the line, it would be a very difficult situation, and we would find the court dividing, some on one side and some on the other.

Of course, as the Senator suggested, the burden would be on the State to prove this intent, if there was any doubt about it. That is, if they did not make their case the claimant would get his liquor. I dare say that three-quarters of the violations of the liquor law in the State of Oklahoma to-day are predicated upon the violation of that provision of the law touching unlawful possession, and not upon the other provision, which prohibits the sale, or the giving away, or otherwise furnishing of any liquor. In other words, it is a crime for a man to have it in his possession with the intent to violate any provision of the law.

So that before he can make a sale he has already committed the crime of unlawful possession, because he must have it in his possession, either constructively or actually, before he can sell it.

So the first crime he commits is this crime of unlawful possession, and three-quarters of the prosecutions in Oklahoma are on that ground. It is easier to find the liquor in a man's possession, and prove his intent to violate the law, than it is to prove, after he has sold it, that he violated the law.

But as the law now is, as I say, we can not prevent commission of the crime of unlawful possession, because as the law now is he has the right, and the Federal court will mandamus a railroad to carry liquor to him and deliver it to him.

Reference was made to the conflict of laws between States. I see no possibility of any conflict between the States over this proposition if Congress passes this bill. Why? Because the State of destination is the only State concerned. The laws of the State of destination are the only laws to be taken into consideration.

Suppose I want to ship some commodity to France and enter it at a certain port. I would be very unwise to buy that article and invest my money in it and bill it to France without looking up the laws of France to determine whether or not I could enter it under their laws at that particular port.

Here it is not a question as to the laws of a foreign country, which may be difficult of ascertainment. It is a question of the laws of one of the States of this Union, a part of this country.

If the liquor is sought to be introduced into the State of Texas for the purpose of doing that which is a violation of the laws of the State of Texas, then the transaction is illegal, and that is all Congress says about it, that then the article is not interstate commerce.

I think Senator Rayner's question a moment ago, when narrowed down—and perhaps Senator Borah meant the same thing, although I did not so understand—is, What would be the effect of this law if it said generally that there should be no interstate commerce in any article or thing which is intended to be used in violation of the laws of the State into which it is sought to be introduced? I can see no reason why that would not be constitutional, because we would come back to the doctrine of *Mugler v. Kansas*, and *Crowley v. Christianson*, and of the Lottery case, to determine how far the States could go in the exercise of their police power.

Remember that the police power of the State is inferior to the power of Congress over interstate commerce. At any rate, if it is not inferior, where the two come in conflict the commerce power of the Constitution is supreme. So that if the State can in the exercise of its police powers prohibit a certain use of a thing or prohibit the sale of a thing, or prohibit its manufacture, what is there in the Constitution of the United States to prohibit Congress from saying that there shall be no interstate commerce in things so intended for use in violation of the laws of the States? I see no reason. But I think you would have to discriminate between flour and whisky. I do not think you could put them on the same basis. I think the Supreme Court would hold this, that as to whisky, as Senator Rayner has suggested, it might be absolutely taken out of interstate commerce, but flour could not be.

I believe the case of bleached flour, under the food and drugs act, is now in the Federal courts. It involves a construction of that act. But upon what theory did Congress pass the food and drugs act? Upon the same theory that the States might pass a food and drugs act, that the things are deleterious to the public, injurious to the public. There is a wide discretion there, but there is certainly a limit to it. Bleached flour, in the opinion of some scientists, may be injurious. In the opinion of others it may not be injurious. But if there is a doubt, according to the best authority you can get—and they are not agreed upon it—I take it the courts would then say, there being some question about it—the legislative power—they might say, "You can not use it; you can not ship it."

But take flour in its pure, unadulterated, natural state, and, I think, the courts would as clearly say that it can not be prohibited. You might cut off all the sustenance of life if that could be done. There must be a limit.

Senator BORAH. Is not that question, however, as Chief Justice Marshall said, pretty early in the life of the court, a question to be settled by the conscience and judgment of the men who make the law?

Mr. CALDWELL. No; I think not. The limitation is suggested by Mr. Justice Harlan in the case of *Mugler v. Kansas*. The contention was made that the right to retail liquor is inherent in the citizens of the United States. The contention was that a man can drink what he pleases, that he can sell liquor as he pleases, so long as he does not interfere with the rights of others or injuriously affect public morals or public health. The answer is, That is true; but who is going to be the arbiter?

Senator BORAH. Let me read you this:

If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects. The power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and in the influence which their constituents possess at elections are in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from this abuse. They are the restraints on which the people must often rely solely in all representative governments. The power of Congress, then, comprehends navigation within the limits of every State of the Union, and so forth. (*Gibbons v. Ogden*.)

Mr. CALDWELL. I do not have to go that far. But here is what I had reference to, in *Mugler* against Kansas:

It is, however, contended that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits for general use as a beverage, no convention or legislature has the right under our form of government to prohibit any citizen from creating for his own use any article of food or drink not injurious to others.

The argument made briefly is that in the implied compact between the State and citizens, certain rights are reserved by the latter which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property without due process of law, and with which the State can not interfere; that among those rights is that of manufacturing for one's own use either food or drink. It will be observed that the proposition and the argument made in support of it equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not injure or affect the rights of others. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage would tend to cripple, if it did not defeat, the effort to guard the community against evils, attending the use of such liquors, it is not for the courts, upon their views, as to what is best and safest for the community, to disregard the legislative determination of that question, so far as from such a regulation having no relation to the general end sought to be attained.

Now, if it had no connection with the general end sought to be accomplished, I take it, it would not be a proper subject for the exercise of the police powers of the States. But the learned justice says:

So far from such a regulation, having no relation to the general end sought to be accomplished, the entire scheme of prohibition as embodied in the constitution and laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a

right does not inhere in citizenship nor can it be said that the Government interferes with or impairs anyone's constitutional rights of liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society and constitutes therefore a business in which no one may lawfully engage.

Now, if the liquor business is on the same basis as the manufacture of flour, then the legislative power might say, "No one can make flour," and we would have no flour. I do not think they are the same thing. I think there is a distinction. I think it is recognized through all the decisions.

I believe the Lottery case is good law in this that it says just as the legislative power of the State in administering its internal affairs, in the exercise of its police powers can take into consideration how the doing of the thing will affect the public, so Congress in the exercise of its power to regulate interstate commerce can take into consideration as to whether or not the locality is affected by the laws of the States being broken down. Is this thing being carried into a State for the express purpose of using it in violation of the laws of that State? If it is, Congress ought not to encourage it. If it is, ought not Congress to take it out of interstate commerce?

And if Congress shall say that liquor intended to be used in violation of the laws of the State of destination is not interstate commerce; in other words, in the language of this act, if Congress shall prohibit interstate commerce in liquor intended to be so used, then it has taken it out of interstate commerce, and it has left in interstate commerce all liquor not intended to be used in violation of the laws of the States.

I undertake to say that had we brought before Congress a bill so broad in its scope as to absolutely take all intoxicating liquors out of the channels of interstate commerce without discrimination——

Mr. GANS. Would you take the tax off?

Mr. CALDWELL (continuing). That there would be a great deal more said on the part of these gentlemen in the way of criticism by reason of our failure to discriminate between the legal traffic and the illegal traffic, than there is being said on the ground that this bill turns on the question of an intent to violate a State law.

This bill puts the wholesale liquor dealers absolutely behind the violator of the State laws, or else it puts them out of court here, because that is the only traffic that is touched by this legislation—the illegal traffic.

Now, then, they are either behind the joint keeper and the bootlegger, in my State, or else they are not in court here, because in my State, if I see fit to do so, I can order from any wholesale dealer in the country, or abroad, liquor for my own personal or family consumption, and take it home and use it—that is not a violation of the law of my State. But suppose the question should arise as to whether or not I should be allowed to exercise that right of personal use, what forum should speak? I say that the State of Oklahoma, in the exercise of its legislative power, should settle that question, if it is ever to be settled, and it ought not to be brought to Congress, because, as I understand it, Congress is not the proper forum to settle the question of personal use of intoxicating liquors for the several States.

I think that is a matter properly within the exercise of the local police power, and that the States ought to settle it for themselves.

But here is a different proposition.

As the chairman has said, people outside of the State are, through the channels of interstate commerce, yes, they are as interstate commerce, bringing into the State, and there delivering that which the instant they make the delivery becomes a public nuisance, and the possessor is a criminal, and that we want to stop; and if the decisions of the Supreme Court of the United States are the law, this is the only body in the United States which can give us that relief.

Senator NELSON. We will now take a recess until 2.30 o'clock, when we will hear Mr. Gans.

(Thereupon, at 2 o'clock p. m., the subcommittee took a recess until 2.30 o'clock p. m.)

AFTER RECESS.

At 2.30 p. m. the subcommittee reconvened.

Senator NELSON. Mr. Gans, you may proceed.

ARGUMENT OF EDGAR H. GANS, ESQ., ON BEHALF OF THE DISTILLERS' ASSOCIATION OF MARYLAND.

Mr. GANS. Mr. Chairman and gentlemen of the committee, it seems to me that the difficulty, if there is any, about this subject, arises out of misconceptions of certain fundamental distinctions. It shall be my effort to make these distinctions clear.

Senator Rayner put his hand on the real question when he asked my colleague, Mr. Maxwell, how this proposed bill differed, in its constitutional aspect, from the bills that had heretofore been declared unconstitutional by the Judiciary Committee of the Senate.

Those bills were introduced in the Sixtieth Congress, and their fundamental purpose was to submit intoxicating liquors transported into any State or Territory for delivery therein or remaining therein for use, consumption, sale, or storage, to the police powers of the State immediately upon arrival within the boundary of the State, before and after delivery, in the same manner as though such articles had been produced in the State.

The question, therefore, was whether Congress could withdraw its power over a shipment at the State line or at some point before the goods were delivered to the consignee, and leave it to be regulated or prohibited by the police power of the State.

On this question Senator Knox, who was chairman of the Subcommittee of the Judiciary, said:

My conclusions are:

First. Interstate shipments are not completed until they reach the consignee.

Second. An interruption or interference with interstate shipments before they reach the consignee constitutes a regulation of commerce.

Third. Regulating interstate shipments is an exclusive function of Congress.

Fourth. Congress can not delegate any part of its exclusive power to the States.

Fifth. To remove the bar or impediment of exclusive Federal power which shuts the States out of the Federal domain, and thereby allow them to enter that domain, is to permit or sanction a State law in violation of the Constitution and in effect to delegate a Federal function to the States. (Doc. No. 146, 61st Cong., 1st sess, pp. ix, x.)

Senator Rayner and Senator Fulton, in separate opinions, expressed substantially the same views, and the views of these three Senators were adopted by the Senate Committee on the Judiciary.

In other words, when you are considering the transportation of commodities from one State to another, interstate commerce per se, or in its fundamental aspect, begins with the consignor and ends with delivery to the consignee, and Congress has no power to permit a State to regulate or prohibit any part of such interstate commerce.

In the Kenyon bill, now presented, it is not proposed to divide the act of interstate commerce so as to leave a part, even though it be the larger part, within the control of Congress and a lesser part under the control of the police power of the State.

That is not the question here. This bill affects the whole shipment. It prohibits the shipment of intoxicating liquors from one State to another when the liquors are intended by any person interested therein, directly or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such other State enacted in the exercise of its police powers.

Now, the only cases thus far decided by the Federal courts justifying acts of Congress which prohibited shipments of merchandise from one State to another are those which deal with "contrabands of commerce" or "outlaws of commerce," or things which are not fully the subjects of commerce.

In his argument before this committee, Mr. Caldwell, the draftsman of this proposed law, frankly admitted that his idea was to get around the decision of the Senate Judiciary Committee already referred to, by making the shipment a nuisance. His argument is that intoxicating liquors shipped from one State into another, when the intention of anybody concerned is to violate the law of such other State, is a nuisance, and can be constitutionally prohibited by Congress under the line of cases just adverted to. Is this argument sound?

This argument makes it necessary for us to examine the line of cases concerning "outlaws of commerce," or, as it is sometimes called, "illicit commerce," and also those cases dealing with things not "subjects" of commerce, because not possessing, in the eyes of the law, all the characteristics of property; and to understand the fundamental principles upon which such cases rest. When we fully understand these principles, we can then see whether, under them, the present proposed law can be justified.

These principles are as follows:

I. Anything is an "outlaw" of commerce or "not a subject" of commerce when it is so in its own nature as applied to all the people of the United States as one nation.

II. They can, therefore, under the national power of regulation of commerce, be denied by Congress the facilities of interstate commerce.

III. They can also, because they are "outlaws" of commerce or "not subjects" of commerce, be prohibited from being shipped out of or into the States by the States themselves.

The leading case is that of *Champion v. Ames* (188 U. S., 321), commonly known as the Lottery case.

The question there was whether Congress could prevent the transportation from State to State of lottery tickets. It was decided by five judges, four dissenting, that Congress had the power. The real ground of the decision was that lotteries were injurious to all the people, and of this the court could take judicial notice—that being so injurious to all the people, they could, in the interest of all the people, be denied the facilities of interstate commerce as “outlaws” of commerce. The court says, page 355 [*italics ours*]:

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of *such articles from State to State* is not a fit or appropriate mode for the regulation of *that particular kind of commerce*? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress, *for the protection of the people of all of the States*, and under the power to regulate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, *as will drive that traffic out of commerce among the States*? * * *

(P. 357.) Besides, Congress by that act does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State and *has only legislated in respect of a matter which concerns the people of the United States*. As a State may, *for the purpose of guarding the morals of its own people*, forbid all sales of lottery tickets within its limits, so Congress, *for the purpose of guarding the people of the United States* against the “widespread pestilence” of lotteries and *protect the commerce which concerns all the States*, may prohibit the carrying of lottery tickets from one State to another.

Again, page 358:

If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of the opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary *to protect the country at large against a species of interstate commerce which*, though in general use and somewhat favored in both national and State legislation in the early history of the country, *has grown into disrepute and has become offensive to the entire people of the Nation*.

The same principle is announced in the case of Hippolite Egg Co. v. United States (220 U. S., 51) in construing the pure food and drug act of 1906 (ch. 3915, 34 Stat., 768), whose object is to keep adulterated article out of the channels of interstate commerce or, if they enter such commerce, to condemn them while in transit or in original or unbroken packages after reaching destination.

The question was whether certain cases of preserved whole eggs, which had been shipped from Missouri to Illinois, could be seized as adulterated in violation of the act in the original package in the hands of the consignee, even though they had not been shipped for sale but to be used by the consignee in manufacturing purposes. It was contended that the court had no jurisdiction in rem, because at the time of the seizure the eggs had passed into the general mass of property in the State and out of the field covered by interstate commerce.

The court said [*italics ours*], page 57:

We are dealing, it must be remembered, with *illicit articles*, articles which the law seeks to keep out of commerce, because they are debased by adulteration and which law punishes them (if we may so express ourselves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to *articles of illegitimate commerce* the rule which marks the line between the exercise of Federal power and State power over *articles of legitimate commerce*. The contention misses the question in the case. There is here no conflict of jurisdiction over *property legally articles of trade*. The question here is whether *articles which are outlaws of commerce* may be seized wherever found, and it certainly will not be contended that they are outside the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over *such articles*? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to *bar them from interstate commerce* and completes its purpose, which is not to prevent merely the physical movement of adulterated articles *but the use of them*, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce.

From the above case it is clear that the powers of Congress over "illicit" commerce is governed by different rules than those which determine and fix the powers of Congress over legitimate commerce. In legitimate commerce the line between State and Federal authority becomes important. In "illicit" commerce no such question arises, for, as we have just seen, the National Government, acting for the Nation, can pursue adulterated articles even after they have gotten into the general mass of the property of the State, and, as we shall see presently, the State may itself forbid the importation into its boundaries of such articles.

Upon the principles of these cases it is of course within the power of Congress to prohibit transportation companies from carrying from one State into another obscene books, pictures, or writings, or other matter of an indecent character, or any drug or article intended for producing abortion, or for any indecent or immoral use, as was done by act of 1900 (ch. 553, s. 4, Federal Penal Code of 1910, sec. 245). All these things—e. g., lottery tickets, adulterated food, indecent articles—all are inherently detrimental in themselves to all the people of the United States. If the thing involves a moral question, it is wrong to the moral conscience of the whole United States as a nation, not a *malum prohibitum* set up by one State against another State. If it is a question of health, it affects everybody in the same way. Therefore they are prohibited and denied the facilities of interstate commerce. These characteristics are not created by Congress, because they exist in themselves, but they are taken notice of by Congress just as the courts take judicial cognizance of the universal character of their dangerous and harmful tendencies.

I make this assertion without fear of contradiction: The United States Supreme Court has never decided that the carriage of any article as contraband of commerce could be constitutionally prohibited which article was not, by the substantially universal consent of

the whole Nation, contraband of commerce, and is therefore marked out, cut off, and declared to be something that can not be carried from State to State.

So, again, an article that is not a subject of commerce may be prohibited from being carried from State to State, but that is precisely because it is not a subject of commerce.

Thus Congress, by what is known as the Lacey Act (1900, ch. 553, s. 2, Federal Penal Code of 1910, s. 242), prohibited the transportation of the dead bodies of wild animals or birds when they are killed or offered for shipment in violation of the law of the State where they were killed or offered for shipment. This act was declared constitutional in the case of *Rupert v. U. S.* (181 Fed., 87, 90), but that was only because the dead bodies of wild animals and birds killed or offered for shipment against the laws of the State are not the subjects of property in the usual sense, but are under the control of the State where they are killed or from which they are to be shipped. They are therefore, under these circumstances, not subjects of commerce at all. The court bases its decision on the case of *Geer v. Connecticut* (161 U. S., 519, followed in *Oklahoma v. Kansas Nat. Gas Co.*, 221 U. S., 223), where the whole subject is elaborately discussed by the then Mr. Justice White.

The other characteristics of "outlaws of commerce" or "contrabands of commerce" or things "not subjects of commerce" is even more striking. That is that the States can prohibit their being carried from or into the borders of the State, something which can never be done by the States as to any objects of legitimate commerce.

The authorities are full and conclusive on this question. To cite a few—

In the case of *Plumley v. Commonwealth of Massachusetts* (155 U. S., 461), the law of Massachusetts was sustained which forbade the sale of oleomargarine, colored in imitation of yellow butter, even though the article was imported into the State and sold in the original package; that such a sale was not a violation of the commercial clause of the Constitution.

The court says (*italics ours*), page 468:

He (the importer) is only forbidden to practice, in such matters, a fraud upon the *general public*. The statute seeks to prevent false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of the people to believe that they are buying something which, in fact, is something wholly different from that which is offered for sale? * * *

(Page 479.) The Constitution of the United States does not secure to anyone the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an *offense against society*; and the States are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character.

But in the case of *Schollenberger v. Pennsylvania* (171 U. S., 1) the Supreme Court of the United States held that a State could not prohibit the importation and sale of pure oleomargarine, not deceptively colored, as this was a legitimate article of commerce.

The Supreme Court, therefore, says to the States: You may keep out oleomargarine deceptively colored. Why? Is it not an article of commerce? Yes; it is if it is pure and not deceptively colored. It

is then an article of legitimate commerce, and you can not keep it out no matter what your local policy may be. But if it is colored for purposes of deception you can keep it out. Here you are dealing with fraud. It is fundamental that no man has the right to cheat another. It is not a local policy, but general—it is inherently wrong. Therefore, you can make oleomargarine “contrabrand of commerce,” or an “outlaw of commerce,” where it is put into such a condition as to deceive the people into thinking that it is butter, and such action on the part of the State will not contravene the commerce clause of the Constitution.

The whole matter is summed up in the case of *Bowman v. Chicago & Northwestern R. Co.* (125 U. S.), where the Supreme Court says (p. 489):

Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. *They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life.* The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power can not be considered regulations of commerce prohibited by the Constitution. * * *

(P. 490.) *If from its nature it does not belong to commerce, or if its condition from putrescence or other cause, is such, when it is about to enter a State, that it no longer belongs to commerce, or in other words is not a commercial article, then the State power may exclude its introduction.*

The same principles apply as to things that are not fully the subjects of property rights.

Thus in *Geer v. Connecticut* (101 U. S., 519), it was held that the State has the right to prohibit the transportation of birds or game lawfully killed in the State, because these articles are *feræ naturæ*, subject only to such ownership as the State permits.

From these authorities and others which could be cited it is clear that “outlaws of commerce” are distinguished by sharp characteristics which never fail, and you can distinguish them as certainly as you tell a white man from a black man. If Congress is to prohibit their transportation they must be inherently wrong, as a shipment of deceitfully colored oleomargarine or a lottery ticket, and wrong quo ad the Nation as a whole.

If it is an “outlaw” of commerce, then it is not a thing with respect to which you can say to a State, “You shall not forbid that thing to come within your borders,” or “You shall not forbid it to go out.” You can do both, because it is not legitimate commerce, and not being legitimate commerce, the Constitution is not violated by such action.

Now, coming back to this bill, wherein does it receive any support from the principles just enunciated as to “outlaws of commerce.” Is intoxicating liquor an article of legitimate commerce, or is it outside of commerce? Do you not know that in every distillery in the United States there is a Government officer who watches everything that is done from the time of the buying of the grain until the distilled liquor is put into barrels—that the barrels are under the cus-

tody of a Government officer in a warehouse until the tax is paid? Do you not all know that a great part of our internal revenue taxes come from distilled spirits?

Oleomargarine was decided to be an article of commerce, *inter alia*, because its manufacture was recognized by Congress and it was made the subject of Federal taxation. (*Shollenberger v. Pennsylvania*, 171 U. S., 9.)

So as to tobacco. The Supreme Court of the United States, speaking of tobacco, in *Austin v. Tennessee* (179 U. S., 345), says (*italics ours*), page 345:

Whatever product has, from time immemorial, been recognized by custom or law as a fit subject for barter and sale, *particularly if its manufacture has been made the subject of Federal regulation and taxation*, must, we think, be recognized as a legitimate article of commerce, although it may, to a certain extent, be within the police power of the States. Of this class of cases is tobacco.

As to intoxicating liquors, the effect of a long line of decisions is summed up by the Supreme Court of the United States in *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, decided January 22, 1912, where the court says it has been indisputably determined—

(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.

(b) That it is not competent for any State to forbid any commerce carrier to transport such articles from a consignor in one State to a consignee in another.

(c) That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to State regulation restraining their sale or disposition.

If, therefore, intoxicating liquors are a recognized and legitimate subject of interstate commerce; if the States can not exclude the shipment of such liquors from another State, then it is clear that the present bill can not be supported upon the theory that intoxicating liquors are "outlaws" of commerce, nor can its validity be founded upon any of the cases cited above. Not only is this true, but the present bill does not itself purport to make intoxicating liquors "outlaws" of commerce. It does not undertake to have Congress say that the use of intoxicating liquors is wrong in itself; or that such use is deleterious to all the citizens of the United States; or that such liquors shall be denied the facilities of interstate commerce. There is no attempt to repeal the internal-revenue laws taxing liquors and regulating distilleries. There is no withdrawal contemplated of the recognition by Congress of liquors being in themselves legitimate subjects of foreign and interstate commerce. Nothing of this sort is attempted. It is, therefore, only a subterfuge to try to show that the bill can be supported upon the theory that liquor shall be regarded as a "nuisance" or an "outlaw" of commerce.

The bill on its face is evidently an attempt to have Congress assist some States in the enforcement of their police regulations of the liquor traffic as against the interests of other States which authorize the manufacture of liquors and desire as wide a market for them as possible.

The question has been asked whether Congress could not make intoxicating liquors "outlaws of commerce" and prohibit their transportation from State to State.

A complete answer, so far as this discussion is concerned, would be that this question does not now arise. The present bill does not pretend to really accomplish this purpose.

But waiving this objection, let us try to frankly answer the question.

Let it be remembered that Congress can not arbitrarily prevent interstate commerce in things which are in their own nature the subject of legitimate commerce. The power as to legitimate commerce is to regulate, not to prohibit. Congress could not prohibit commerce in wholesome meat or bread. This is conceded. So when Congress comes to consider things that may be classed as illegitimate commerce, it does not merely put articles in that class of its own arbitrary will, but recognizes the existence of characteristics in the article which in the common opinion of the country render it harmful or deleterious, just as the Supreme Court of the United States, in passing upon the validity of acts of the legislature dealing with such articles, takes judicial cognizance of their characteristics in determining whether the legislative act is arbitrary or not.

Thus the Supreme Court of Tennessee decided that cigarettes were not legitimate articles of commerce, because wholly noxious and deleterious to health and their use inherently bad and bad only; but the Supreme Court of the United States held that this was not so in such a way as to make them "outlaws of commerce." (*Austin v. Tennessee*, 179 U. S., 350, 367.)

The difficulty of dealing with the question of the wholesale prohibition of interstate commerce in liquors is that it is difficult to realize the atmosphere under which such a question would come to be practical. The lottery case furnishes an illustration. In early times in this country lotteries were not looked upon with disfavor. Churches and public buildings were built with their proceeds. They were fully authorized by the legislatures; but with the passing of time there came to be a complete revolution in sentiment, so that they were bad to the moral conscience of the whole country. And therefore the Supreme Court, taking judicial cognizance of this situation, said that lottery tickets were contraband of commerce, because everybody agreed that they were hurtful to everybody in the United States who indulged in their use—that lotteries were a widespread pestilence, going into every home and working harm.

But this is not true as to the use of intoxicating liquors. There is no belief, shared by substantially the whole people of the United States, including the Government, that the use of intoxicating liquors is so inherently wrong and deleterious to the whole people that it should be prohibited or suppressed as lottery tickets are prohibited or suppressed.

We know that its use is freely permitted among all the civilized people in the world; that its prohibition in countries like England, France, Germany, or Italy would be regarded as simply ridiculous; that foreign traffic in them is enormous and has been since the beginning of the Government; that even in this country, though it is subjected to numerous restrictions under the police power of the States, still its prohibition is attempted only in a part of the country. We know, further, that it is still recognized by the Government of the United States as a legitimate subject of commerce; that its distillation is regulated by the Government; and that it is heavily taxed by the Government; that the real situation in this country is that a great majority of the people are in favor of its use, but its

temperate use, whilst a large number of earnest and zealous people are in favor of its prohibition.

If the sentiment as to the use of liquor ever grows, as did the sentiment as to lottery tickets, to such an extent that substantially the whole country will believe that the use of intoxicating liquor in any form as a beverage is inherently wrong and deleterious to the whole people—a state of things which I regard as wholly impossible in the very nature of things—then such a state of facts would justify Congress in recognizing it and passing a law excluding liquor from interstate commerce on the theory of the lottery case. But it is scarcely practical for us to be considering now what Congress might legally do on an impossible state of facts. Of course, Congress could not declare liquor an “outlaw of commerce” and still regulate its manufacture and tax it. All the internal-revenue laws relating to intoxicating liquors would, of course, have to be repealed.

This bill does not purport to “outlaw” intoxicating liquor. It is really an attempt to aid one State to enforce its police power at the expense of other States.

This bill undertakes to say to Maryland, “Your whisky is outlawed because it is going to be used in violation of the prohibition laws of another State.” What does that mean, gentlemen? It means that here you have two States with conflicting interests, does it not? Take two States, for illustration, one a prohibition State and one where whisky is manufactured. Here you have two States which are interested in different things, and interested in different ways about a thing which is a subject of commerce. One State wants it and the other does not want it. What was the interstate-commerce law passed for? Was not the interstate-commerce law passed for the very reason that there were conflicts of interest between this State and that State as to commerce—as to the interchange of commodities? And is it not a fundamental and final answer to this question to say that when you are dealing with interstate commerce, the interstate-commerce clause requires you not to deal simply with the idea of helping one State in its interest, in what it thinks is its interest, against the interests of another State. I think my brother who talked just before me was very frank about it, that the only way that this conclusive argument can be gotten around at all is to attempt to make this not a regulation of interstate commerce, but to make it contraband of commerce. Now, that, I say, is conclusively shown, can not be done in this case.

Now, I deny the power of Congress under the interstate commerce clause to use the great power of the Government of the United States to aid one State as to its local police matters against another State. There is no authority, that I know of, properly understood, that contains that principle.

In one of the most recent cases in the Supreme Court of the United States the true principle of the interstate commerce clause was stated.

In *Oklahoma v. The National Gas Co.* (221 U. S., 229), the court says (*italics ours*), page 255:

And yet we have said that in matters of foreign and interstate commerce there are no State lines. *In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say that it is constituted of the welfare of all the States.* * * *

Here is involved simply an attempt to have Congress say to one State, "Now, you have a prohibition law; you have been trying to enforce it and you do not succeed entirely. Why do you not succeed? Because here come in some goods from abroad, or from another State." Now, Congress says, "We will help that; we will take up that situation and we will endeavor, under the commerce clause, to so hedge things about that you can more perfectly enforce your law." Where, under any section of the Constitution, does Congress get the right to supplement or aid or take the place of the purely police powers of the State? Because that is all it amounts to; and my brother Caldwell is perfectly right when he says it is not even that, it is not even a regulation of commerce, because, as you will see upon looking at these cases in the Supreme Court, that the power is exclusive, and there must be some uniform rule. Why? Because, in interstate commerce, Congress deals as a nation; and, dealing as a nation, it deals as a unit; and, dealing as a unit, when it regulates it must be a uniform regulation, and therefore it must be something in the power of Congress to do. Congress can not adopt the police laws of the States.

In the case of *Rahrer* (140 U. S., 545), the case you have already been over, it is said, page 562:

Nor can Congress transfer legislative powers to a State, nor sanction a State law, in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. * * * It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a State.

Congress can not take up a law of the State and enact it as its own law unless it is the kind of law it could have enacted without referring to the State. These things, in other words, are so different, the police power dealing with the internal affairs of the State and interstate commerce dealing with this great Nation as a nation, these ideas are so disparate in law that Congress can not, acting as a nation, acting as a unit, take up and pass a law by adopting a State law if that State law justifies itself only under the police powers of the State.

Then, again, speaking now of the object of the interstate-commerce law of the Constitution, the same decision says that the object was undoubtedly to prevent "commercial regulations, partial in their character, or contrary to the common interests."

"Common interests," and "common interests" in the language of the Supreme Court in that case, means the interests of the people of the United States as a Nation under the commerce clause. That is what it means.

Gentlemen, that is about the view I wish to emphasize, and I want to reiterate, as earnestly as I possibly can, that this law can not be justified, constitutionally, under the contraband idea, of putting the thing out of commerce; nor can I see that it can possibly be a regulation of commerce, when it simply undertakes to help one State against another in its police regulations, taking something which that other State may pass, which Congress could not pass itself, and which is therefore contrary to the very decision which I have read.

Senator NELSON. I want to call your attention to the Wilson law and point out that it is exactly on the lines of this bill. Before

the Wilson law was passed the Supreme Court held that interstate commerce went to the extent of allowing the sale of the unbroken package, did it not?

Mr. GANS. Yes, sir.

Senator NELSON. Here is the Wilson law, and let us see how this bill follows it:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Mr. GANS. Yes, sir.

Senator NELSON. That is exactly what this bill says. It says that when liquor comes into any State, it shall be subject to the laws of that State. Here is an exact model.

Here the Federal Government relinquished its power over interstate commerce to the extent of allowing selling in the unbroken package. In this bill we propose to relinquish a little more of that power. This bill—I do not refer to the contract part of it, because that does not meet with my approval—the first part of the bill is identically in the language of the Wilson law, and this law meets fully the argument that this is a delegation of legislative authority. If it is a delegation of legislative authority in this case, it was also a delegation of authority to leave it to the laws of the State or Territory in reference to the disposing of it in the unbroken package. If there is a delegation of legislative authority in this case, there was also in the Wilson law.

Mr. GANS. Now, will you allow me to answer that?

Senator NELSON. Yes.

Mr. GANS. Or try to answer it, I mean; because, to my mind, the answer is very clear, although you all may not think so. The answer is this, and it is fundamental: It is just exactly like it was with Shylock; it is not so hard to surrender your little finger, but when it comes to taking a slice out of your heart, it is different, is it not? In dealing with this question, the Wilson bill, as you have suggested, the court said what? Let me give the situation. Before the Wilson bill was passed there was the case of *Leisy v. Hardin*, in which they held that the power of Congress over interstate commerce extended not only from the time the consignor began to ship the goods to the time of its delivery to the consignee, but that it followed the sale in the original package by the consignee. This was the case of *Leisy v. Hardin*. The act of 1890 had this effect: It let go the power of Congress, so far as the sale in the unbroken package was concerned.

Now, take the language of the Wilson law. By the language itself you could read it to mean that as soon as liquor got into the State it must be subject to the law of the State, but the Supreme Court of the United States took it up and said:

It can not be. If you construe the language to mean that, then you are interfering with interstate commerce in its fundamental aspect; you are interfering with the transportation of goods from the consignor to the consignee. But when you let go the power over the sale in the original package, you are

not dealing with interstate commerce, per se, you are not dealing with a thing over which Congress has exclusive jurisdiction; you are dealing with an incident of interstate commerce, a thing like a wharf, or a warehouse, over which the State has police power unless Congress interferes. In other words, the jurisdiction over the original package being in the State under its police power unless Congress prevents it, and if Congress takes off its hand, then what is restored? Does Congress give the State power to sell in the original package? No; Congress can not give the State anything. Congress simply takes off its concurrent supervisory jurisdiction, and the State police power, ex propria vigore, governs the sale of the package. That is the ground upon which they put it.

Senator NELSON. No; they put it upon the ground that the liquor had not arrived in the State. They used the term "arrival." They said it had not arrived in the State until it had been delivered to the consignee.

Mr. GANS. Yes.

Senator NELSON. That was the real gist of the case.

Mr. GANS. I have the language. It is *Rhodes v. Iowa* (170 U. S., p. 424):

Whilst it is true that the right to sell, free from State interference, interstate commerce merchandise was held in *Lelsy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. On the other hand, the power to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect and imported in its very essence a regulation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State.

Now, if that means anything it means that interstate commerce per se, going from the consignor to the consignee, is pure interstate commerce, with respect to which Congress has exclusive jurisdiction under the Constitution, and you all know perfectly well that if Congress is given by the Constitution exclusive power over that kind of interstate commerce (*Southern Ry. v. King*, 217 U. S., 531) it could not give any part of it to the State. If the power is in the State, where did the State get it? It never had it, and it can not be given it by Congress. But the authorities do say this, that when it comes to incidents of interstate commerce, such as selling in the original package, you have a thing which may be under the State or under Congress, as Congress chooses. That is all there is to it.

Senator BORAH. In other words, if they had held that the Wilson law meant, by the word "arrival," when it physically entered the State, they would have made the law unconstitutional?

Mr. GANS. Yes.

Senator BORAH. And they held that it meant when the transaction was closed?

Mr. GANS. Yes. They held that the sale in the original package was something that could be left to the State or not, at the option of Congress.

Senator NELSON. Excuse me for having interrupted you.

Mr. GANS. Certainly. I rather like it than otherwise. Now, I have only one other thing to say, and that is in respect to the delegation of power. The discussion which I have just made leads up to this, and therefore I regard it as supplemental to the very able discussion made by Mr. Maxwell.

The point is that it is really not a regulation by Congress at all, but it is really delegating to the State the power to do something. It must be that, in essence, because Congress can not take up and adopt a law of the State when the thing which it does is something that Congress could not do itself. It therefore amounts to simply a regulation by the State and not by Congress.

But look at the absurdity of the bill—I mean the legal absurdity, of course. Here is a case, and I will not read the language, where there is a shipment of liquor from one State to another, where the liquor is “intended”—intended by whom? Intended when? “Intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner use, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States.” Intended by anybody connected, directly or indirectly, at any time, with the transaction, to violate the law of any State, with respect to which intention there is nothing in the bill—and they do not want it there—which connects knowledge of that intention with the consignor. Now, I ask you, gentlemen, as lawyers, all of you experienced lawyers, who have been dealing with weighty affairs all through your lives, did you, up to the time of reading this bill, ever hear of a proposition which fundamentally is so opposed to all principles of inherent justice, as taking from me property in transit with respect to which I am entirely innocent on account of the fact that somebody, at some time, directly or indirectly connected with the transaction, may intend to violate the laws, no matter what the laws are, in regard to ale, in the original package or not, of another State. Did anybody ever hear of anything like that?

There are States, as you know perfectly well, where some counties are wet and some dry, and if the consignee lives in a city which is wet, to which the consignment goes, and if that consignee, without the knowledge of the consignor, intends to send some of that liquor to the dry counties, he intends to violate the law, and I am to be punished for that, although I have no way of finding out. Even though I asked him and he lied to me, I would have forfeited my property.

Then, if I sell to a consignee and he says that he intended or intends—in order to escape paying the bill when the bill comes in for the goods—to sell on Sunday, or after 12 o'clock at night, or to sell to a minor, or within a certain distance of a schoolhouse, or to do any one of those things which may be prohibited by the laws of his State, I am to be held to forfeit all my goods. Moreover, a thing can not be contraband of commerce unless it is contraband before it starts. Before it starts it must be a thing which is not a subject of commerce before it is put on the cars, because a thing would very rarely get to be contraband of commerce while it is going on the train.

Here is a thing put on the train innocently by the consignor, an article manufactured under the laws of his State and recognized by the United States by its taxation and the policy of regulation as being an article of commerce, and yet because somebody intends, after it gets there, to violate the law of the State to which it is

shipped it has been contraband of commerce from the beginning, under the rules I have indicated, and can be seized even in transit or seized at the other end. Now, with very great respect, that is supremely ridiculous, from my point of view. I do not believe there is a man who has any inherent sense of right who could believe that a consignor should be deprived of his property under these circumstances; and yet that is what is intended here.

Senator DILLINGHAM. How would this law differ in principle from one that was framed in the same manner and made to apply to the ordinary poisons that are used among druggists, and to opiates, and to firearms, and to things of that kind that might be used legally or might be used illegally?

Mr. GANS. I think that the State, under its police power, can pass laws relative to the use of dangerous things.

Senator NELSON. We have a law governing the shipment of dynamite.

Mr. GANS. Yes; but that comes under danger in transportation.

Senator DILLINGHAM. Yes; but if Congress had power to pass this law, would they have the power to pass laws in relation to these other things?

Mr. GANS. Yes; Congress could under that theory go into the whole matter and pass police regulations in regard to anything alleged to be dangerous in its use. This is a sort of entering wedge, by which Congress, under the interstate-commerce power, would take police jurisdiction. I do not see where it is to stop. All that they have to do is to have some reason for saying that the thing which you are going to ship is going to do harm to the people where you ship it, under their legal ideas or their traditions, and you could grasp and hold, therefore, in the Government of the United States a vast area of power which is now exclusively in the States.

Mr. CALDWELL. Might I ask you a question?

Mr. GANS. Certainly.

Mr. CALDWELL. Is it not true that under the law as it now is, an original package might be seized in the hands of the consignee immediately after delivery, at the point of destination, and confiscated if the consignee intends to use it in violation of the law, and all that notwithstanding whether the liquor had been sold on credit or not?

Mr. GANS. That is true.

Mr. CALDWELL. And the innocence of the vendor?

Mr. GANS. Yes.

Mr. CALDWELL. So that this simply moves it up to the delivery prior to the point of destination; that is all, is it not?

Mr. GANS. That is all, because it is everything. It moves along an impossible path; that is all. The only reason why the package you represent could be seized in the hands of the consignee is that when it gets there, under the law of 1890, it is under the control of the State, and the State has control of it inherently and originally. The United States has a right to take that control away; but if it leaves its hands off, then the State has control; but the State has no control, and never did have any control, over goods in transit.

Mr. CALDWELL. You will find in numbers of cases I have cited, for instance, in the case of Eighteen Barrels of Beer, from Oklahoma, where exactly that thing was done. That is, after delivery they

seized the 18 barrels of beer, although they were still in the car, a remnant of a carload shipment.

Senator NELSON. There was a gentleman here who, just after we took a recess, requested that he might be heard. I think he represented the German-American Alliance. I told him that we would give him a hearing if the rest of the committee agreed.

Mr. Wildermuth, of Philadelphia, arose.

Senator NELSON. Please proceed, and be kind enough to be as brief as possible. All of the members of the committee are much pressed with other work, but we want to give you all the time that you feel you need.

STATEMENT OF MR. P. A. WILDERMUTH, OF PHILADELPHIA, PA.

Mr. WILDERMUTH. Mr. Chairman and gentlemen, there has been a great deal said here to-day regarding the unconstitutionality of this bill, Senate bill No. 4043. I agree with the gentleman that the bill would be declared unconstitutional for the reason that it would impair the obligation of contracts.

The parties addressing your committee say that in Oklahoma they had a personal right to use liquors, notwithstanding the prohibitory laws of that State; but I am of the opinion that if this Kenyon bill is made a law it will deprive every citizen in the entire United States, notwithstanding the police power of the State, of his right to have liquor sent to his residence for his own personal use. I think that would be the effect of the passage of the Kenyon bill, and I ask leave to file a brief.

Senator NELSON. Very well; your brief will be filed.

The brief referred to is as follows:

BRIEF ON LOCAL-OPTION LEGISLATION AND THE COMMERCE CLAUSE, BY P. A. WILDERMUTH, REPRESENTING THE GERMAN-AMERICAN ALLIANCE OF PENNSYLVANIA.

The Supreme Court of the United States held, in an opinion filed on January 22, 1912 (*Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, October term, 1911, No. 64), that a statute of Kentucky which makes it unlawful for any common carrier to transport beer or any intoxicating liquor to consignees in "dry" localities is in conflict with the power to regulate interstate commerce vested in Congress in so far as it applies to intoxicating liquors shipped from other States, and does not justify an interstate railroad in refusing to accept such consignments. The court also held that the shipper might obtain relief by bill in equity, filed in either the State or Federal court, without first resorting to the Interstate Commerce Commission. The essential facts in the case were as follows:

Upon the passage of the Kentucky statute, the defendant railroad, a Kentucky corporation, operating a railroad extending into Indiana, notified the public that it would discontinue receiving consignments of beer or other liquors to points in that State where the local-option law was in operation. The plaintiff, a brewing company, tendered shipments of beer from Evansville, Ind., to such counties, prepaying the freight and complying with all shipping regulations, which the defendant refused to accept. The plaintiff then filed a bill in equity in the State court praying that the railroad be enjoined from refusing to accept such shipments. A preliminary injunction was issued as prayed for, whereupon the case was removed by the defendant to the United States Circuit Court upon the ground of diversity of citizenship, and also because it involved questions arising under the Constitution and laws of the United States. An answer was filed by the defendant and the preliminary injunction allowed by the State court made permanent, which decision was

sustained, on appeal, by the United States Circuit Court of Appeals for the Seventh District (172 Fed. Rept., 117), from whose decree this appeal was taken. The opinion of the court, delivered by Justice Lurton, after disposing of certain objections to the jurisdiction, is as follows:

"The case was heard upon bill and answer. The defense is based solely upon the terms of the Kentucky act of March 21, 1906, now section 2569a, Carroll's Kentucky Statutes of 1909, entitled 'An act to regulate the carrying, moving, delivering, transferring, or distribution of intoxicating liquors in local-option districts.' By that act it is made unlawful for any common carrier to transport beer or any intoxicating liquor to any consignee in any locality within the State where the sale of such liquors has been prohibited by vote of the people under the local-option law of the State. A violation of the law subjects the offender to a fine of not less than fifty nor more than one hundred dollars for each offense.

"Upon the assumption that this legislation effectively prohibited both State and interstate transportation of such commodities within the State, the railroad company notified all of its agents, in and out of the State, to refuse to receive such liquors when consigned to any local-option point. This notification was by a printed circular letter, which set out the full text of the act and gave a full list of all such local-option points. In express terms this notification applied in both inter and intra state shipments; and it is averred this circular was filed with the Interstate Commerce Commission. It is not, however, averred that the commission either took any action thereon or that it was asked to take any action.

"The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local-option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

"By a long line of decisions, beginning even prior to *Lelsy v. Hardin* (135 U. S., 100), it has been indisputably determined:

"(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

"(b) That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another;

"(c) That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to State regulation, restraining their sale or disposition.

"The Wilson Act, which subjects such liquors to State regulation, although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are: *Rhodes v. Iowa* (170 U. S., 412); *Vance v. Vandercook Co.* (170 U. S., 438); *Heyman v. Southern Ry Co.* (203 U. S., 270); *Adams Express Co. v. Kentucky* (214 U. S., 218).

"Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment, in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases above cited, reached the same conclusion: *Cincinnati, N. O. & T. P. R. Co. v. Commonwealth* (126 Ky., 563).

"The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other States any commodity which is an ordinary subject of interstate commerce, and such transportation, could not be prohibited by any law of the State of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the State. It is obvious, therefore, that, in so far as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight.

"The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the State court nor the circuit court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an

order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.

"Why should the brewing company have made complaint to the commission? What relief could it afford? There was no tariff question. There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport or that the railroad company did not have transportation facilities. Evansville was not discriminated against in favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference, where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the commission as a purely administrative body.

"The decision in the case of *Texas & Pacific Ry. v. Abilene Cotton Oil Co.* (204 U. S., 426) is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate making necessarily required a resort to that body as a basis for a common-law recovery of an excessive charge.

"The result is that the decree of the court below must be affirmed."

STATEMENT OF MR. ROBERT JACKSON, OF CINCINNATI, OHIO.

Mr. JACKSON. Mr. Chairman and gentlemen, I have a word to say on behalf of some individual shippers, if the committee will hear me.

Senator NELSON. Proceed.

Mr. JACKSON. I wish to answer one or two questions that have arisen, apparently during this argument, with respect to the constitutionality of this bill.

Senator NELSON. Which side of the case are you on?

Mr. JACKSON. I am on the side of those who are opposed to this bill. I want to call attention to the decision of the Supreme Court in the *Vandercook* case, in 170 United States, with reference to the effect of the *Wilson* bill. So many times that question has been asked, and I just want to call the attention of you gentlemen to what the Supreme Court said with reference to this. The court says:

But the weight of the evidence is overcome when it is considered that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment—

The court is speaking of liquor in this particular case—

and this right is wholly unaffected by the act of Congress which allows State authority to attach to the original package before sale, but only after delivery.

That act of Congress referred to is the *Wilson* bill. The opinion cites the cases of *Scott v. Donald* and *Rhodes v. The State of Iowa*, and continues:

It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States, and that the inhibitions of a State statute do not operate to prevent liquors from other States from being shipped into such State on order of a resident for his use.

Senator DILLINGHAM. What case was that?

Senator NELSON. That is the South Carolina case. I am familiar with that.

Mr. JACKSON. It is the case of *Vance v. Vandercook Co.* (170 U. S., 451, 452).

Senator NELSON. It was put on the ground that in the State of South Carolina a man had a right to buy liquor for his own use. The personal use of liquor was not prohibited.

Mr. JACKSON. Yes, sir; but there was a seizure in that case under the law of South Carolina of 73 packages of liquor shipped to one person.

Senator NELSON. You know South Carolina claims the exclusive right to handle liquor within her own borders.

Mr. JACKSON. Yes; as a State.

Senator NELSON. Yes.

Mr. JACKSON. In the same decision the court says further along:

But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States and does not rest on the grant of the State law. Either the conditions attached by the State law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are void.

Mr. MAXWELL. That is cited with approval by the court in the decision on the 22d of January last in the case of the Louisville & Nashville Railroad Co. *v.* The Cook Brewing Co.

Mr. JACKSON. Yes; and I think it has also been cited in the case which Mr. Maxwell cited, of the Adams Express Co. *v.* Kentucky, and was there cited with approval.

Mr. MAXWELL. Yes.

Mr. JACKSON. I also wanted to get into the record the expression which Senator Knox gave, and which I think in a very few lines tells the whole story of legislation of this character; and without repeating what was read by the gentleman who preceded me, I want to read two or three paragraphs. Says Senator Knox:

Congressional expression in favor of personal use would be an expression upon a subject with which Congress has nothing to do and upon it all sorts of confusing questions would arise. The same evidence required to defeat the claim of importation for personal use would give the State the right to follow up and seize the goods under any existing State law covering the subject.

There are some constitutional questions closed beyond dispute. One is that Congress can neither add to nor take from the police power of the States. I think no one can seriously question the proposition that as the law now stands, under the decisions of the court, it is not within the police power of the State now to prevent the delivery to the consignee of an article purchased by him in another State, and if the passage of an act, such as proposed in these bills, would enable the States to interrupt interstate shipments it could scarcely be denied that the additional power was given to the States by act of Congress.

In other words, the police power of the States would be extended by an act of Congress, which is a constitutional absurdity.

Senator NELSON. And that is exactly what was done in the Wilson law.

Mr. JACKSON. No, sir; the Wilson law, if I may differ with you, Mr. Chairman, did not do that at all. As has been explained here, the Supreme Court made the distinction that the Wilson law did not attempt to interfere with the shipment until the interstate transaction

was ended, and then it said the State could step in and take possession; and the State has to-day the right, just as the gentleman from Oklahoma says; and if the law has been broken in the State, after the interstate transaction has ended, after the delivery has been made, it is the fault of the administration of the State law, not the fault of the administration of the Federal law, that that law has been broken. The State has to-day authority, by search and seizure laws, by laws prohibiting the sale, by a thousand and one different laws.

What is the real reason that those laws have not been enforced? It is simply because in particular communities the public sentiment was not in favor of the enforcement of those laws. That is the reason why they are not enforced.

I have before me a clipping from a newspaper published in Macon, Ga., in which it is stated that prohibition in Georgia is a farce.

Senator BORAH. You will find people who believe that, everywhere in the world. It may not be true, though.

Mr. JACKSON. It may not be true; but he says it is a farce simply because of the public sentiment in the different communities. They will go and vote for prohibition, but at the same time they want to get the liquor themselves.

I said I was not going to discuss the constitutional phase of it at this time, after the arguments that have been presented, but I simply wanted to say a word about one other phase of the question that has been referred to. It has been stated by Mr. Dinwiddie and a number of others, in the hearings that have been had before, that the passage of this law was not to interfere with the personal use of liquor, and that no State had a law that did interfere with an individual to prevent him from procuring liquor. That is not exactly so, and I want to show you that this very law, if it was enacted, would interfere with individuals getting liquor if they saw fit.

In other words, if I, living in any part of the greater portion of the State of Kentucky, should seek to get from Cincinnati liquor, or to get it from any other place in the United States, I could not do it if this law should go into effect; that is, if it was a constitutional law, and in that way it would interfere with the right of the individual.

Mr. CALDWELL. It would be because of the Kentucky law, though, would it not?

Mr. JACKSON. It would be because of the Kentucky law; but, as I say, it has been stated that in no State would the individual be prohibited.

Senator BORAH. That would only be true if the State prohibited him from getting it?

Mr. JACKSON. Yes.

Senator BORAH. I think that is conceded. If the State prohibited it you could not ship it there.

Mr. JACKSON. Yes; but it has been stated all through the record that there was no such law as that and that the individual rights of the citizen would not be trampled on in any way, whereas I call your attention to section 2569a of the Kentucky statutes, which was the very section in controversy in the Cook case, already cited, which absolutely prevents the individual from procuring liquor except in quantities of 1 gallon; and then he has to go off some place where they have a right to sell liquor and procure it in person, and it can

not be shipped by a carrier within the State of Kentucky. I want to show you that the suggestion that has been made that this bill would not in itself affect the individual liberties is wrong, and there is one case where it would affect them; and as we know from experience, these laws spread from State to State very quickly through the efforts of these gentlemen, when they find that they are held to be constitutional.

So that it would result in the same thing, not only in Kentucky, but in every other State of the Union. I thank you, gentlemen.

Senator NELSON. If there is no one else to be heard, this will close the hearings.

STATEMENT OF LEVI COOKE, ESQ.

Mr. COOKE. Mr. Chairman, may I place one brief statement on the record? I do not think that the hearings should close without the attention of the committee having been directed to the material which is available in the records of the Bureau of Internal Revenue, showing the inability of the States, or the refusal of the States, to enforce their prohibitions against manufacture which exist in some of the State laws.

Senator BORAH. I do not suppose that that would make any difference to us here.

Mr. COOKE. Except to show that the States, contending that they are helpless, are in a poor position to demand an extension of the field in which their police power can operate, when they fail or refuse to enforce their police authority within the constitutional limits of that authority. The records in the department will show that during the last fiscal year some 2,800 illicit stills were seized and forfeited, most of which, it is true, were in operation in those States which have State-wide prohibition by State enactment. It will be shown by those records that only about 600 stills were registered in compliance with the internal-revenue laws in the United States as a whole.

Mr. CALDWELL. How many of those were in Kansas and Oklahoma?

Mr. COOKE. The records will show, as to the compliance with the internal-revenue laws in Kansas and Oklahoma, that there are many violations of the laws of those States capable of ready detection by State officers were the present laws enforced within constitutional State police limitations.

Mr. CALDWELL. How many stills were seized as being in violation of those laws in the States of Kansas and Oklahoma?

Mr. COOKE. I do not know. In the whole United States there were some 2,800 stills seized.

Senator BORAH. By the United States Government?

Mr. COOKE. Yes; by the United States Government. Those stills were seized by the United States Government not in the exercise of any police authority, but in the exercise of the protection of its own revenues. The United States Government went into those States, discovered these stills in operation, and seized and destroyed them, and in many cases sent the operators to prison.

Senator BORAH. Then, in other words, you believe that if there is an illegal distillery in a State there ought to be a little more liquor put in over the border the other way?

Mr. COOKE. On the contrary, Senator, the contention which I am now making is simply this, that by reason of the refusal of the States to interfere those stills are operated in violation of the laws of the States which prohibit the manufacture. If I am not mistaken, in some cases State officers, officers performing functions under the State laws, have been interested in the operation of stills, not only in violation of their own State laws, but in violation of the United States internal-revenue laws.

Senator NELSON. What does all this argument amount to, Mr. Cooke, except to state how successful you liquor men have been in avoiding the laws of the State?

Mr. COOKE. That is not the point, Senator, if you please. The point is that the States themselves refuse to assist the United States Government in the protection of its revenues, and that the States are now here, so far as their position can be voiced by these gentlemen, asking that the constitutional limitations of their police authority be extended, whereas, as a matter of fact, they are not fully performing their functions within their present police authority.

It simply shows the fact, which I feel safe in stating, that far from there being any demand for this legislation from the sovereign States of the Union on account of their helplessness to protect the people within their own police power, there is no such demand, except that the temperance organizations, who desire any legislation which they can procure, come here and advocate an extension of the police authority of the States by national legislation. The records of the United States Government, and particularly of the Internal Revenue Bureau, disclose those conditions, and this committee ought to have that information before it, when it proceeds to pass upon the practical necessity, even if it could, by any possibility, be constitutional, of legislation of this character.

Senator BORAH. All right.

Senator NELSON. Any of you can file briefs in the case if you desire to.

Senator BORAH. I would like to suggest to the people who have been favoring this bill that there is one proposition on which I am not clear, and I wish they would file a brief on it. That is the question of intent in this contract. I have not yet made up my mind on that proposition.

Senator NELSON. I want to say to those who are in favor of the bill how it looks to me. As to the last part of your bill, aside from the constitutional questions, I regard it very doubtful if it would be possible to enforce it. I think if you would drop out all after the semicolon in your bill—that is, all relating to contracts, etc.—you would have then a bill on all fours, in principle, with the Wilson Act, and it would be very helpful to you, but I think the other part of your bill, relating to contracts goes too far, and that it is impracticable to enforce it.

ADDITIONAL STATEMENT OF HON. FRED S. CALDWELL, OF OKLAHOMA.

Mr. CALDWELL. I would like to state to the committee why that was put in there. It is a matter of record in the Federal courts of Oklahoma and the last part of the record was made in the Supreme

Court here. The Federal courts, upon petition of the foreign liquor dealers, issued blanket injunctions for the purpose of protecting this sacred right of interstate commerce in intoxicating liquors, which operated in this manner. A, B, and C, good, reputable citizens of Oklahoma, might go before the judge of the district court, which is a court of general jurisdiction and a court of record, and swear to facts which, in the opinion of the judge of that court, would be amply sufficient to constitute probable cause for believing that a liquor nuisance existed at a particular place, say, at the depot of the Santa Fe Railroad Co.

Having determined the existence of such probable cause, the court would issue its warrant, which is a command to the sheriff to go to the place, search for the thing and seize it; in other words arrest it and bring it into court. The Federal injunction had this effect. It said to the sheriff, "You will execute the process of the State court at your peril. If it turns out that the liquor is still in the hands of the carrier, undelivered under the contract of interstate shipment, we will put you in jail for contempt of court." Of course the result was that it paralyzed the executive arm of the State judiciary.

Senator BORAH. I can see the necessity of this as a practical proposition, but what I wanted to hear you on was as to whether or not we could do that thing. Can you declare a contract void which represents value, price of property, and so forth, upon the evil intent of another party?

Mr. CALDWELL. If you can take the property of one man because of the unlawful intent of another man, under certain circumstances, I think within the same limitations you might say that about the contractor in this case.

The same point was raised in the hearing before the House committee the other day, and I made this statement. It is my opinion of the law. If I have a case of whisky in my cellar and some evil-disposed person steals my case of whisky and takes it down in the alley and begins to peddle it out, or has it down there with the intention of peddling it out, and an officer seizes the liquor and arrests the person, certainly my case of whisky is not to be forfeited because of the intent of a trespasser to violate the law with it.

But now suppose I deliver my case of whisky to my servant to go home with it and put it in the cellar, and he, instead of doing that, goes up in the alley and sets up a joint there and begins to peddle it out. If my servant does that, I having intrusted him with the property, his possession and intent are sufficient to impress that liquor with an illegal character and subject it to seizure. The Dobbins case is instructive on that. There is a case under a law which provides that if the lessee of a distillery violates the law, the entire distillery shall be forfeited. In that case the distillery was in the hands of a lessee and the lessee violated the law and the Federal Government seized the entire property. The lessor lost thousands of dollars' worth of property because of that violation of the law, and in that case you will find the question very thoroughly discussed.

Take, again, ships under the piracy laws. Suppose I own a ship and put a captain in charge of her and a crew on board and they go out upon the sea with a cargo, but instead of carrying my cargo to the foreign port to which it is consigned and engaging in lawful com-

merce as I have told them to do, they turn pirates upon the high seas. I, the owner, must lose the vessel if it is caught, and it must be destroyed because of the piracy.

Senator BORAH. Of course, you do not want a law that is not constitutional?

Mr. CALDWELL. No.

Senator BORAH. And I do not want to vote for a law unless I think it is constitutional, much as I would like to have it. Suppose that John Jones goes over to St. Louis from Oklahoma, and St. Louis, or Missouri, recognizes the absolute right there to make a contract and sell that liquor; they are doing a thing which is perfectly legitimate under that law. But suppose all the time there is in the mind of the man who is purchasing the liquor the intent of taking it down to Oklahoma and selling it in open violation of the law, and he makes his contract with the man to purchase, and goes his way. Then suppose the vendor sues for the purchase price 60 days afterwards, and the purchaser says, "I was shipping that liquor to Oklahoma for the purpose of selling it in Oklahoma in open violation of the law." Can you declare that contract void because of the intent of the purchaser of that liquor, without any knowledge on the part of the seller who made the contract that that evil intent existed?

Mr. CALDWELL. Regardless of whether you can or not, I think that contract does not come within the—

Senator BORAH. I so understood your argument a while ago.

Mr. CALDWELL. I confess, while this is perhaps put together in an original way, I copied from the Wilson Act and the penal code and the food and drugs act to make this law. I refer to the provisions in the penal code that went into effect about January 1, 1910, about collecting the purchase price, that makes it illegal to act as the agent of the vendor for the purpose of completing the sale by collecting the purchase price, and that is drawn very guardedly for the purpose of keeping the operation of the law within the scope of the Federal jurisdiction, I take it. It uses the term "connected with the transaction." Here the "transaction" means the transaction in its interstate-commerce features; in other words, interstate commerce in its fundamental aspect.

The transaction between the parties which you state in your question seems to me to have nothing to do with interstate commerce in its fundamental aspect, and it has no connection with this transaction aimed at in this law.

Mr. JACKSON. Suppose you wrote a letter from Oklahoma instead of going to St. Louis?

Mr. CALDWELL. It would be exactly the same thing.

If you undertake to make the delivery in Oklahoma, then, of course, the contract involves interstate commerce in its fundamental aspect. But I think there is no doubt about the power of Congress, and, as a matter of policy, all that anyone has got to do to protect himself is to get payment in advance.

Senator BORAH. Yes.

Mr. CALDWELL. It is easy to protect himself. It is exceedingly difficult or impossible for the State to protect itself in the absence of such regulations.

Mr. MAXWELL. Would you mind telling us what is the significance of this expression: "Which is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction"? What is all that intended to cover?

Mr. CALDWELL. All features of interstate commerce and commerce in intoxicating liquors. If there is a loophole for them to get out through, I did not know it at the time I drew that bill. [Laughter.]

**STATEMENT OF MR. WALTER E. HILDRETH, PRESIDENT OF THE
AMERICAN WINE GROWERS' ASSOCIATION.**

Mr. HILDRETH. Mr. Chairman, I represent the American Wine Growers' Association. We look upon this matter in a very serious light, because if this bill should become law our business might be cut off almost entirely in some cases.

Take the question of shipping wines or liquors into a State which was not, as we understood the law, a prohibition State altogether. It is a question where any wines, liquors, ales, or beer are shipped into a State to be used in any way contrary to the law of the State. We know perfectly well that in New York State, in which I personally live, there are a great many police regulations, such as not allowing the sale of liquor after 1 o'clock at night, or to minors, and so forth. A great many of the members of our association are shipping goods from California, where a great many of them live, to New York. If an intention to violate the law is to be inferred from the sale or use of those goods after 1 o'clock at night—and it is very difficult to prove that they would not be so sold or used—those goods might be seized even in New York State, irrespective of any prohibition law. New York State has no prohibition law whatsoever, except in certain counties. There are no general prohibition laws. But as it appears to us in respect to goods from our brothers in California, shipped to New York, if it were shown that those goods might be sold or were intended to be sold after 1 o'clock at night the whole shipment might be seized at once. It struck our people that they would like to be heard pretty strongly on that matter.

Senator NELSON. We have given the wine growers a hearing. At our last meeting two gentlemen were heard representing the wine growers.

Mr. HILDRETH. There have been a good many of them here.

Senator NELSON. You may file a brief if you desire to do so. It will go into the record and be printed with the hearings.

Mr. CULMAN. How long a time may we have to file such a brief?

Senator NELSON. How long do you want? We will give you 10 days to file a brief.

Mr. CULMAN. That will be quite sufficient.

Senator NELSON. You can send it to the clerk of this committee and he will see that it goes into the record and is printed. This closes the hearings.

Thereupon, at 3.45 o'clock p. m., the subcommittee adjourned.

The following briefs were received and ordered printed:

BRIEF OF THE AMERICAN WINE GROWERS' ASSOCIATION.

AMERICAN WINE GROWERS' ASSOCIATION,
OFFICE OF THE PRESIDENT,
Urbana, N. Y., March 16, 1912.

HON. KNUTE NELSON,
*Chairman Subcommittee Committee on Judiciary,
United States Senate, Washington, D. C.*

DEAR SIR: Following your suggestion to file a brief with your committee, the American Wine Growers' Association makes the following short statement in opposition to a favorable consideration of the Kenyon bill (S. 4043):

1. There is no proper and just demand for the bill. What demand there is comes from a skillfully worked-up movement. It comes from an organized conspiracy largely directed and controlled by paid and professional agitators.

2. There is no real need of the bill. What need there is for this proposed legislation comes from the local and State authorities not doing their duty and by not enforcing their own laws. In fact, the local and State laws are amply sufficient to deal with any or all of the troubles or evils alleged by the advocates of the bill.

3. It is hardly necessary at this time to discuss the constitutionality of the bill, as this whole matter has been ably discussed by the attorneys. It would seem, however, that in comparing the constitutionality of this bill with the game law one important factor was overlooked, namely, that when the restriction was placed on interstate commerce prohibiting illegal game shipments the interdiction was on an illegal act in its inception, while Senate bill 4043 attempts to interdict a commercial action which in its inception is perfectly legal and which could in no way become an illegal action until after the interstate-commerce act had been completed.

But what appeals to us more directly as merchants and manufacturers of wine are the evil results which of necessity would follow the enactment of this bill as a law. It would put into the hands of a fanatical party a lever so powerful that it would be practically impossible to engage in any interstate transaction in wines, or, in fact, in any intoxicating article, whether used for medicinal purposes or for consumption as a beverage.

The provisions of the bill are most drastic, as they interdict the transportation of the above articles "if intended" by any person interested directly or indirectly in the transaction to be used in violation of any law of such State or Territory. It is obvious that even though all the parties directly interested might have the best of intentions in regard to obeying the law, yet some one indirectly connected with the transaction by intending to break the law might thereby forfeit the property rights of all others in the same.

As an illustration, a California wine producer might ship to a wholesaler in New York a certain brand of wine with every intention on the part of both parties to obey in every way the law, the package being duly marked, showing what it contained, etc. A member of the Anti-Saloon League while seeking transgressors of local laws in New York might have found that in some cases wine of this same brand was being sold at some place at an hour contrary to law, or was sold to some minor. The fact that such a sale had taken place with that same brand of wine in the past might well show "intent" of the same being done again, and the wine might be seized in transit, irrespective of any attempt to transgress the law by any party directly interested and without any recourse in a court of law.

4. We have been told that this bill is not aimed at the wine makers, but at the saloon keepers, bootleggers, etc., but we fail to find in the action of the introducers of this bill in the past anything to justify that they would yield one iota in any way if the power were given them to suppress to the fullest extent the traffic in wines, no matter how necessary they might be to the comfort and health of the average man, for in this bill the most plenary powers are given them to interdict in any way the legitimate trade. In the civilized world the business of wine making is a legitimate and honored one. Throughout Europe the sale of wines, while a source of revenue to the respective Governments, has been for centuries a legitimate commerce, and how can importations of foreign wines be prohibited into the United States? If this bill should become a law, this action by Congress would invite similar action in

the legislature of the States. Where is the line to be drawn? There are many other articles of commerce that might be brought under a similar ban, such as tobacco, firearms, knives, etc., articles which, if used in an excessive or vicious manner, may become a serious menace to society, but if used in moderation and in a legal manner are a blessing, but even then not to such a great extent a blessing as malt liquors and good pure wine when properly used.

5. We had most forcibly brought to our notice this point at the recent dinner of the American Wine Growers' Association. The editor of one of our leading daily papers, in referring to the use of wines, said that some time ago he was present at a banquet attended by two prominent financiers: One of those gentlemen, hale and hearty at 70, capable of controlling and managing millions in a strong and able manner, always used wine at his meals, and still keeps his hand on the helm; the other, while equally strong mentally, a younger man by fully 10 years, was anemic, dyspeptic, and obliged within a short time thereafter to consult the ablest practitioners of Europe, whose verdict was that had they been able to get him 10 years before and had he followed their directions in eating and drinking, they would almost have guaranteed him 30 more years of useful and active life, instead of sinking into a premature grave, worn out and used up, when he should have been in the prime of life.

6. We hardly think it necessary to go further into these matters, as we feel certain that your committee must duly appreciate the value and benefit of grape growing and wine making in the United States. We would urge you to think seriously before approving this bill, which practically places the control of the wine and liquor trade in the hands of fanatics, some of whom, while honest in their convictions, are incapable of judging aside from their bias, while others allow their fanaticism to lead them into every kind of dishonesty and prejudice. In their frantic desire to interdict all traffic in wines and liquors, they claim that the State laws can not be enforced if this power is not granted; that the moment the interstate traffic in wines is completed the goods are immediately taken away, and that the State with prohibition has no power to control the article after it is within its boundary. We might add that a State that is so feeble and inefficient as to be unable or unwilling to enforce its own laws has no right of existence and might be better relegated back to a Territory and the citizens placed in the same category as the Indian, to be controlled, punished, and rewarded by the Central Government and in no sense fit for self-government and self-control.

7. Our association represents the grape and wine growers of many different States—in fact, of all the States that produce grapes and wines, as California, New York, Ohio, Missouri, New Jersey, Virginia, and North Carolina. The industry is one that has grown from nothing up into the millions in the past 60 years, and there has always been a law-abiding and temperate spirit among the wine-growing communities.

We hope your committee will not report favorably this bill which delegates to a band of fanatics the control of our right to do business between the different States.

Respectfully, yours,

AMERICAN WINE GROWERS' ASSOCIATION,
By W. E. HILDBRETH, *President*.

BRIEF OF THE CALIFORNIA WINE ASSOCIATION, SUBMITTED BY W. CULMAN.

At the hearing before the subcommittee of the Judiciary Committee of the Senate on March 9, 1912, the representative of the California Wine Association could not be heard for lack of time. This brief is accordingly submitted at the suggestion of the chairman.

The constitutional and legal questions which the bill involves have been fully discussed by able lawyers. We shall accordingly refer only to the unfairness and impracticability of the bill as it appears to a layman from a commercial point of view.

Our objections to the proposed law are:

1. Its effects would be disastrous to our industry.
2. It is unnecessary.
3. The motives which underlie it are wrong and against public policy.
 1. The bill, if passed, would forbid the shipment of wines from California if the wine so shipped is intended to be used by the purchaser "in violation of

any law" of the State or Territory to which the shipment is destined. Section 2 cancels all property rights in any wine so shipped.

These provisions would make practically impossible the shipment of any wine from California to any State or Territory for this reason: Every State has some kind of liquor law; not necessarily a prohibitory law, but in many cases a reasonable law regulating the sale of wines and liquors. Now, if, to use the language of the bill, "spirituous, vinous, * * * or other intoxicating liquor is intended by any person interested therein, * * * to be received, * * * or in any manner used in violation of any law of such State * * *," the shipment of such wine or liquor shall be prohibited. The State of New York has a law which forbids the sale of wine and liquor after 12 o'clock. If, therefore, a dealer in New York sends an order for wine to California with the intention of selling it after 12 o'clock, the shipment is prohibited. If the shipment is made, and if it is seized upon information of prohibition spies, section 2 cancels all property rights in the merchandise. The consignee, naturally, would not pay for merchandise that he does not receive, and the loss, therefore, would fall upon the vineyardist in California, through no fault of his own, since he has no way of knowing the intention of the purchaser nor any way of controlling the latter's actions. Other States have laws with other provisions, such as prohibiting the sale of wine and liquors to minors, and in such cases the result would be the same. The necessary operation of the law as proposed would result in the confiscation of the property of men who are engaged in a lawful business and who have broken no law of their own State or of the Nation, and the law would become operative not upon the commission of an unlawful act, but upon the suspicion that some one else intended to commit an unlawful act.

The defenders of the bill assert that it is not intended for any such purpose, but that its intention is to prevent the shipment of wine and liquors for unlawful purposes into States which have prohibitory laws. If this is the purpose of the bill, we submit that it should be stated specifically. The bill, as it is drawn at present, would place in the hands of the prohibitionists, whose avowed and well-advertised purpose is to prohibit ultimately the sale, and in fact the use, of wines and liquors everywhere, the absolute power to prevent shipments, not only to the States that have prohibitory laws, but also to every other State.

2. We understand, from the arguments made before your committee, that this legislation is asked upon the ground that the States which have laws prohibiting the sale of wines and liquors within their borders are unable to enforce these laws. If this were true it would be pitiful. We deny that any State of our country is so nerveless or has become so degenerate that it has not the power to enforce its constitutional laws. But if there be a State in this pitiful plight, is it right or necessary that the Federal Government should intervene, not to assist in enforcing the State's law among its own citizens, but to impose commercial restrictions and penalties upon the citizens of other States? It is notorious that laws prohibiting the sale of wine, beer, and liquor are not enforced, but this is so in every case either because the officers of the State will not enforce the obnoxious laws or because the citizens of the State will not permit their enforcement. The State of Tennessee has constitutional prohibition. The cities of Nashville, Chattanooga, and Memphis are actually issuing licenses for the sale of liquor. Each license bears a notice that it does not exempt the holder from State prosecution, but there are no prosecutions because grand juries refuse to indict. Here is a specific instance where both the administrative officers and the people themselves refuse to enforce the law. No responsible officer of any State is asking Federal aid in the enforcement of any prohibition law, but individual citizens, upon whom rests no responsibility, are demanding this unnecessary Federal legislation in the interest of prohibition over the heads of their own State officers, their purpose being to compel by indirection the enforcement of laws which the people themselves refuse to enforce.

3. Wine is produced in many of the States of this country. The investment in vineyards and wineries runs into hundreds of millions of dollars. The greatest wine-producing State is California. The number of acres in that State devoted to grape culture is 350,000. The money invested in these vineyards, in the wineries, cellars, distributing establishments, etc., amounts to \$150,000,000. The annual output of wine is 50,000,000 gallons. The number of people directly employed in the industry and depending upon it for their livelihood is 60,000, mostly small farmers. It is the third largest agricultural industry of the State. The people who have invested their money in this industry and their time (it

takes six years of constant toil to bring a vineyard into full bearing) are entitled to the protection of their investment and of their lawful business, the more so as they were encouraged to engage in it by the government of California and by the Government of the United States, both of which maintain expensive governmental institutions to foster and extend viticulture. A law like the one under consideration, which is intended to cut off the means of distribution, would ruin this great industry; it would render worthless by far the greater part of the vineyards, and it would be equivalent to confiscation.

The wine industry is fostered, and always has been fostered, by the government of every civilized nation. It is recognized everywhere as a source of wealth. Occupation in it has always been considered an honorable calling. The soil devoted to grape culture is generally of such a nature that it can not be used for any other purpose; if the vineyards are destroyed it must soon return to its former uncultivated and unproductive condition.

Wine is an article of food; it is beneficial. The nations who use it in their diet are more energetic, more progressive, more advanced in civilization than those who do not. If there be any doubt on this point it will be removed by making a mental comparison between the people of the wine-growing nations of Europe and the people of the United States on the one side, and the Mohammedan nations on the other. The comparison will be wholly in favor of the former, although the latter lead what the prohibitionist would have us believe is the ideal life, since they enforce real prohibition through their religious laws and practice it generally. The greatest wine-growing country of the world is France. Her people consume more wine per capita than the people of any other country; they also possess more wealth per capita, and they stand second to none in the arts and sciences, in culture and refinement. Consider what would become of France and the prosperity of her people if her viticulture were destroyed. California is in the same position; in proportion to population, viticulture is equally important to the people of that State. We submit that no law should be enacted that would destroy or even tend to hamper this great and growing and beneficial industry.

INDEX.

	Page.
American Wine Growers' Association, brief of.....	174
Armor, Mrs. Mary Harris, statement of.....	16
Bartholdt, Richard, Representative in Congress (tenth district of Missouri), statement of.....	43
Bills before the subcommittee, text of:	
S. 1523, Senator Curtis's bill.....	37
S. 2310, Senator McCumber's bill.....	38
S. 3710, Senator Culberson's bill.....	38
S. 4043, Senator Kenyon's bill.....	4
Boole, Mrs. Ella A., statement of.....	22
Cabell, R. E., Commissioner of Internal Revenue, letter to William R. Hewlett.	30
Caldwell, Fred S.:	
Argument of.....	130
Statement of.....	171
California Wine Association, brief of.....	174
Carter, Mrs., of North Carolina, statement of.....	23
Chastain, W. A., statement of.....	31
Citation of authorities in support of Kenyon bill.....	130
Committee on the Judiciary, list of members of.....	2
Cooke, Levi, statement of.....	169
Couzens, Miss Phoebe, views of.....	36
Crafts, Rev. Dr. Wilbur F., telegram from.....	22
Culman, W., brief submitted by.....	175
Dinwiddie, Rev. Edwin, statements of.....	3, 29, 32, 51, 84
Dornhoefer, Mrs. E. J., of New York City, chairman Ladies' Auxiliaries German-American Alliance, statement of.....	45
Du Bose, Rev. Horace M., statement of.....	18
Ellis, Mrs. Margaret Dye, remarks by.....	14
Evans, A. W., statement of.....	24
Fankhanel, Mr. A. L., statement of.....	50
Fischer, Mrs. Carrie, of Baltimore, Md., statement of.....	49
Gans, Edgar H., argument of.....	150
George, Mrs. Ella M., statement of.....	22
Greaves, C. L., statement of.....	27
Green, Mrs. George, statement of.....	23
Grunebaum, Mrs. Henrietta, of New York City, statement of.....	47
Hahn, John, of Astoria, Oreg., statement of.....	69
Harris, R. E. L., statement of.....	35
Herzog, Mrs. Matilde, of Philadelphia, Pa., statement of.....	48
Hewlett, William R., letter of Commissioner of Internal Revenue to.....	30
Hexamer, Dr. C. J., president National German-American Alliance, statement of.....	98
Hildreth, Walter E.:	
Statement of.....	173
Brief of.....	174
Horton, S. B., statement of.....	33
Huckabee, W. A., statement of.....	31
Jackson, Robert, statement of.....	166
Juilliard, Louis W., of California, statement of.....	71
Kenyon bill (S. 4043), text of.....	105
Kermes, Mrs. Margaret, of New York City, statement of.....	47
Marshburn, N. E., statement of.....	25
Maxwell, Lawrence, argument of.....	104
McLeod, Rev. Donald C., statement of.....	22
Priber, E. C., of California, statement of.....	81
Protest of the Boston Branch of the National German-American Alliance.....	104

	Page.
Protest of the Colorado Branch of the National German-American Alliance....	103
Protest of the German-American Alliance of Missouri.....	102
Ressler, Charles F., of Baltimore, Md., statement of.....	47
Sbarboro, A., of California, statement of.....	95
Stevens, Mrs. L. M. N., statement of.....	15
Stubbs, W. B., statement of.....	28
Timm, Adolph, of Philadelphia, Pa., secretary National German-American Alliance, statement of.....	44, 97
Webb, Hon. Edwin Y., Representative in Congress from ninth district of North Carolina, statement of.....	84
Werneth, Mrs. Marie, of Philadelphia, Pa., statement of.....	48
Wildermuth, P. A., statement and brief.....	164

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